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The Supreme Court of the United States has recently decided questions of constitutional law which are of more than ordinary importance and value. We refer to the cases of Hennington v. State of Georgia, 16 S. C. Rep. 1086; Illinois Cent. R. Co. v. State of Illinois, 16 S. C. Rep. 1096, and Plessy v. Ferguson, 16 S. C. Rep. 1138. The two first mentioned cases dealt with the mutual relations of interstate commerce and State police power, while the last mentioned case involved the question of civil rights of negro travelers in those of the States which have adopted what is known as "separate coach" laws.

The Hennington case came up on writ of error from the Supreme Court of Georgia. It was therein held that a statute of Georgia making it a misdemeanor to run a freight train in that State on the Sabbath day is a regulation of internal police and not of commerce, and that such regulation is not invalid as interfering with interstate commerce, though its effect is to entirely prevent freight trains from passing through said State on that day from and to adjacent States. The opinion of the court by Mr. Justice Harlan refers first to the inherent power of the States to pass Sunday laws, the same being viewed not as religious but as purely police regulations, it being proper for a legislature to enact that a community shall observe an enforced day of rest once in each week for the general physical welfare. The dissenting opinion of Mr. Justice Field, in *Ex parte* Newman, 9 Cal. 502, which has become the leading American judicial expression on the subject, is cited and its argument approved. The court then calls attention to the undoubted right of States to incidentally interfere with interstate commerce in the interest of public hygiene and physical safety, as, for instance, in maintaining quarantine regulations (Morgan's Louisiana, etc. Company v. Louisiana Board of Health, 118 U. S. 455), or general rules for licensing railroad engineers, and not permitting unlicensed persons to conduct trains within a State's boundaries. Smith v. Alabama, 124 U. S. 465; Nashville, etc. Ry. Co. v. Alabama, 128 U. S. 96. The dissenting judges on the other hand contend that "this statute in requiring the suspension of interstate commerce for one day in the week amounts to a regulation of that commerce and is invalid, because the power of congress in that regard is exclusive."

In the case of Illinois Central R. Co. v. State of Illinois, it was held that an Illinois statute providing that all regular passenger trains shall stop a sufficient length of time at the railroad stations and county seats to receive and let off passengers with safety, as construed by the State Supreme court, requiring a fast-mail train, carrying interstate passengers and the United States mail from Chicago to places south of the Ohio river, over an interstate highway established by authority of congress, to turn aside from the direct interstate route, and run to the station in Cairo, three miles and a half away from that route, and back again, in order to receive and discharge passengers at that station, for the interstate travel to and from which the railroad company furnishes other and ample accommodation, is an unconstitutional obstruction of interstate commerce, and of the passage of the United States mails. The fact that the statute interfered with the speedy and uninterrupted carriage of the United States mails was as much of a factor contributing to the decision of the court as was the obstruction of interstate commerce.

The case of Plessy v. Ferguson was on writ of error to the Supreme Court of Louisiana. The decision was that an act requiring white and colored persons to be furnished with separate accommodations on railway trains does not violate Const. Amend. 13, abolishing slavery and involuntary servitude; that a State statute requiring railway companies to provide separate accommodations for white and colored persons, and making a passenger insisting on occupying a coach or compartment other than the one set apart for his race liable to fine or imprisonment, does not violate Const. Amend. 14, by abridging the privileges or immunities of United States citizens, or depriving persons of liberty or property without due process of law, or by denying them the equal protection of the laws. The opinion of the court by Mr. Jus-

tice Brown shows very clearly that the distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theaters, and railway carriages has been frequently drawn by that court. Strander v. West Virginia, 100 U. S. 303; Virginia v. Rives, 100 U. S. 313; Neal v. Delaware, 103 U. S. 370; Hall v. De Cuir, 95 U. S. 485; Civil Rights Cases, 109 U. S. 3; Louisville, N. O. & T. Ry. Co. v. State, 133 U. S. 587. Similar statutes for the separation of the two races upon public conveyances were held to be constitutional in Railroad v. Miles, 55 Pa. St. 209; Day v. Owen, 5 Mich. 520; Railway Co. v. Williams, 55 Ill. 185; Railroad Co. v. Wells, 85 Tenn. 613, 4 S. W. Rep. 5; Railroad Co. v. Benson, 85 Tenn. 627, 4 S. W. Rep. 5; The Sue, 22 Fed. Rep. 843; Logwood v. Railroad Co., 23 Fed. Rep. 318; McGuinn v. Forbes, 37 Fed. Rep. 639; People v. King (N. Y. App.), 18 N. E. Rep. 245; Houck v. Railway Co., 38 Fed. Rep. 226; State v. Judge, 44 La. Ann. 770; Louisville, N. O. & T. Ry. Co. v. State, 66 Miss. 662.

It will be observed that in the present case there was no question of interference with or regulation of interstate commerce. Mr. Justice Harlan dissented from the conclusion of the court presenting his views in a vigorous manner.

NOTES OF RECENT DECISIONS.

TRIAL—REMARKS OF JUDGE TO JURY ON FAILURE TO AGREE.—It is held by the Court of Civil Appeals of Texas in North Dallas Circuit Ry. Co. v. McCue, 35 S. W. Rep. 1080, that remarks of the trial judge, to the jury, that he will keep them to the end of the term unless they agree, as the county could not afford to try the case over again, are ground for reversal. The trial judge, says the court, in the exercise of his discretion may keep a jury together during the term, until an agreement is reached, or it is ascertained that no agreement can be reached; but, outside of this, he has no power or authority in coerce or prevent a verdict. Except in open court, and in answer to questions propounded to him, or to give instructions to them, or in order to ascertain the probability of an agreement, there is no law or authority for a judge to hold any communication with a jury. While the judge has the authority to keep the jury together until the end of the term, there is no warrant of authority for him to tell one or more of them, out of court, or all of them, in court, of the trouble and expenses of trials, and that he will keep them together until the term shall have expired. We do not believe that there was any intention on the part of the honorable trial judge to coerce a verdict, but that he was moved with an earnest desire to expedite the business of the court; yet we are led to believe, from all the circumstances, that the verdict was the direct outcome of the language of the judge. We are aware of the fact that, in some instances, in other States, it has been held that such language is not improper; but under our system, where the independence of the jury is so carefully and rigidly guarded, we prefer the other line of decisions, which condemn such language. State v. Hill (Mo.), 4 S. W. Rep. 121; Railroad Co. v. Barlow (Tenn. Sup.), 8 S. W. Rep. 147; Randolph v. Lampkin (Ky.), 14 S. W. Rep. 539; Insurance Co. v. White (Ark.), 24 S. W. Rep. 425; Edens v. Railroad Co., 72 Mo. 212.

MUNICIPAL CORPORATION—SEWERS—EASEMENT—INJURIES TO ABUTTING LAND.—The Supreme Judicial Court of Massachusetts holds in Cabot v. Kingsman, 44 N. E. Rep. 344, that an easement acquired in land for a public street includes the right to construct sewers beneath the surface, though the fee remains in the landowner; that a city is liable for damages to land abutting on a public street, resulting from the withdrawal of quicksand from beneath its surface in the construction and maintenance of a public sewer, though the sand was removed by pumps from the sewer, into which it had fallen by its own weight, or had been carried by percolating water; and that where statutes providing for the taking of land for public streets make no provisions for damages to abutting land by the removal of the lateral support thereto by construction of sewers, and the city's liability is therefore controlled by the common law, the city is liable for such damages, though the sewer was constructed by an independent contractor. The court says in part:

Whatever may be true of percolating waters, we think that the defendants had no right to take away the soil of the plaintiff in land which they had not taken under the statutes, and that it is immaterial that the soil was removed by means of pumps from the trench into which it had fallen by its own weight, or had been carried by percolating water. We are unable to distinguish the case from one where the soil falls in from the surface in consequence of an excavation in the adjoining land. The plaintiff, if the facts be as he offered to prove, has been deprived of the lateral support to his land, in consequence of which the quicksand has run from under the surface of his land into the trench, and has been removed by means of pumps, and this has caused the surface to settle and crack. It was the duty of the defendants to prevent this in some manner, if they did not take the plaintiff's land.

The defendants, in the brief of their counsel, as we understand, concede that the statutes under which the right to construct the sewer in Marginal street was acquired make no provision for the payment of such damages to land as the plaintiff offered to show. This seems to result from the decision in Chelsea Dye-House & Laundry Co. v. Com., *ubi supra*; in Lincoln v. Com., 164 Mass. 1, 41 N. E. Rep. 112; and in *Id.*, 164 Mass. 368, 41 N. E. Rep. 489. The cases of Trowbridge v. Brookline, 144 Mass. 139, 10 N. E. Rep. 796; Parker v. Railroad, 3 Cush. 107; and Dodge v. County Com'rs, 3 Metc. (Mass.) 380, were decided under statutes materially different, as to damages, from St. 1889, ch. 439, under which the defendants in the case at bar acted. The statutory provisions as to damages in each of those cases appear in the opinion in each case. In the present case the plaintiff's rights and the defendants' liability must be determined by the common law. The extent of the right in this commonwealth of a landowner to the lateral support of adjoining land was considered in Gilmore v. Driscoll, 122 Mass. 199. The contention of the defendants is that, if there is any liability, Roberts, the contractor, is alone liable. It is not clear that by the terms of the contract the defendants, acting through their chief engineer, did not retain such control over the manner of constructing the sewer as to render themselves liable for injuries to third persons resulting therefrom, within the principle of the decision in Linnehan v. Rollins, 137 Mass. 123. But whether this is so or not, assuming the offer of proof to be true, we think that the defendants are liable if the result of what has been done in the proper performance of the contract has been to remove the soil from the plaintiff's premises to his injury. In Dalton v. Angus, 6 App. Cas. 740, 829, Lord Blackburn states the law as follows: "Ever since Quarman v. Burnett, 6 Mees. & W. 499, it has been considered settled law that one employing another is not liable for his collateral negligence, unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching to him, of seeing that duty performed, by delegating it to a contractor. He may bargain with the contractor or that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it. Hole v. Railway Co., 6 Hurl. & N. 488; Pickard v. Smith, 10 C. B. (N. S.) 473; Tarry v. Ashton, 1 Q. B. Div. 314." See Hughes v. Percival, 8 App. Cas. 443; Bower v. Peate, 1 Q. B. Div. 321; Hardaker v. District Council, Law T. March 21, 1896, p. 69; Harding v. City of Boston, 163 Mass. 14, 39 N. E. Rep. 411; Blessington v. City of Boston, 153 Mass. 499, 26 N. E. Rep. 1113; Woodman v. Railroad Co., 149 Mass. 335, 21 N. E. Rep. 482. In the opinion of a majority of the court, the presiding justice could not properly rule on the plaintiff's offer of proof that the action could not be maintained, and the exceptions should be sustained. It is unnecessary now to consider the rule of damages if the action can be maintained.

Justices Holmes, Knowlton, and Lathrop are of a different opinion from that herein expressed. Apart from other differences, they think that the withdrawal of the support or barrier of soil to subterranean water is not a wrong, even if the adjoining land subsides (Popplewell v. Hodkinson, L. R. 4 Exch. 248), and that the support of quicksand which flows so freely as to be raised by a pump ought to follow that analogy. They are inclined to regard the best distinction as that between the support of liquids and the support of solids.

ATTORNEY AND CLIENT — COLLECTION OF MONEY—DEPOSIT—FAILURE OF BANK. — In Gaar, Scott & Co. v. Hughes, 35 S. W. Rep. 1092, decided by the Court of Chancery Appeals of Tennessee, it appeared that a firm of attorneys received for collection a note from a non-resident client, and placed it in the hands of a constable, who received payment of it, and placed the money to his official credit in a local bank, whose solvency had never been questioned. He drew his check payable to the attorneys, as was his custom, but did not see them that day. Three days later, he met one of them, and tendered the check; but, before that day, the firm had been retained to prepare an assignment for the bank. When they accepted a retainer from the bank, their only knowledge of its insolvency was given them professionally, and they did not know that the constable had collected the note. The check was not accepted, the attorney saying that he had no time to attend to the matter. The check could not have been collected, and no absolute refusal was made of it, for fear of defeating the purposes of the assignment. The bank closed its doors the next day, but not before the deposit had been transferred to the credit of the payee of the note, at the direction of the attorneys. It was held that the attorneys were not liable for the amount of the note. The court says in part:

The single question for decision is: Were defendants, as attorneys, guilty of such negligence or misconduct as makes them liable for whatever loss was sustained in connection with the McKennon note, placed in their hands for collection? Attorneys must

exercise reasonable care and diligence, and reasonable skill and knowledge, in the execution of business intrusted to their professional management, and they are liable to an action if guilty of default in either respect, whereby their clients are injured. Tersely expressed, reasonable diligence and skill constitute the measure of an attorney's engagement with his client. The rule as thus formulated has guided the courts in their decisions from the earliest cases to the present day. A full discussion of the subject will be seen in the following cases: Pennington's Ex'rs v. Yell, 11 Ark. 212, and authorities cited; Fitch v. Scott, 3 How. (Miss.) 314, 34 Am. Dec. 86, and full note. A suit of this character must, in the nature of things, if well founded, to some extent affect the professional standing of the attorney sued; and therefore he is entitled, as held in the case of Pennington's Ex'rs v. Yell, *supra*, and authorities there cited, to the benefit of that rule of universal application, extending to all the relations of society, that every one shall be presumed to have discharged his legal and moral obligation until the contrary shall be made to appear. What, in our opinion, actually amounts to that degree of crassitude for which the law holds an attorney liable, must depend in each case upon its own particular facts and circumstances. Authorities *supra*. His relation to his clients is, in a general sense, that of agency; but the nature and functions of his agency are peculiar in some degree, inasmuch as they involve considerations of public policy. And hence, it is said, his duties cannot be performed in a manner to subserve the true interest of his client if limited to that strict line of routine conduct chalked out in the law as the pathway for ordinary agents; and it is therefore inevitable that, in the discharge of these duties, he must be intrusted with a liberal share of discretion. An eminent judge has said: "Such discretionary powers are necessary for the plaintiff's interest. Without the exercise of them, many times, and under many circumstances property sufficient to pay the debt would not sell for enough to pay the costs." And says he: "Although extensive authority has been exercised by the attorneys, we have had but few cases of complaint, and the courts have seldom been called on to state the limits of their authority or of their responsibility to their clients." And he states the principle that, in the exercise of these discretionary powers, an attorney is not liable when he has acted honestly, and in a way he thought was for the interest of his client. Lynch v. Com., 16 Serg. & R. 368. Under these well settled rules, it has been held, making special applications of them, that an attorney should disclose to his client every adverse retainer, or even every prior retainer, which may affect the discretion of the latter. So, whatever it is important for the client to know, it is the duty of the attorney to communicate to him, if he can. It is also incumbent upon him to notify his client immediately of money collected, and await instructions, and, upon demand, pay it over. These are all well understood duties, and, if loss or damage accrue to the client in consequence of their omission, the attorney must make it good. Weeks Attys. § 260, *et seq.*; 1 Am. & Eng. Enc. Law, p. 958, and authorities cited.

CARRIERS OF GOODS—CONTRACT LIMITING LIABILITY — INTERSTATE SHIPMENT. — The Court of Appeals of Kentucky decides in Ohio & M. Ry. Co. v. Tabor, that under Const. § 196, providing that "no common carrier shall be permitted to contract for relief from its common-law liability," provisions in a contract by a railroad company for the shipment of stock, making its liability as carrier dependent on the giving of a written notice by the shipper of any injury to the stock, or claim for damages, before the stock is unloaded, and an agreement that the value of the stock did not exceed a certain sum per head, are illegal and void. Such constitutional provision is not a regulation of interstate commerce, and applies to a contract for shipment into another State, where the contract is made and to be partly performed in Kentucky. The court says:

The case of Railway Co. v. Gaan, 8 Tex. Civ. App. 620, 28 S. W. Rep. 349, was a case where the shipper had signed or accepted a bill with a condition requiring notice of damage before suit should be brought, but a Texas statute provided, in substance, that such agreement should be invalid; and the court sustained the validity of the statute, and allowed the shipper to recover, notwithstanding he had failed to give the stipulated notice. In Railway Co. v. Johnson (decided by the same court Jan. 23, 1895), reported in 29 S. W. Rep. 428, substantially the same question was raised, and decided adversely to the contention of appellant. The shipment was made from Texas to another State. The opinion of the court was delivered by James, C. J. We quote as follows: "The first assignment presents the action of the court sustaining plaintiff's (appellee's) exception to that part of the answer which set up that plaintiff was barred of his action by reason of a clause in the contract of shipment providing that suit should be commenced within forty days after the damage occurred, or such lapse of time should be conclusive against the validity of the claim. The pleadings showed an interstate shipment of live stock, and the position that appellant takes, in making this defense, is that our statute of March 4, 1891, prohibiting the making of a stipulated contract or agreement by which the time is limited to a shorter period than two years, has no application to such contracts. The provision plainly does not in any manner attempt to regulate commerce. It imposes no burden or restraint on trade or transportation, but does that which every State has power to do, namely, to provide and regulate the remedy within its jurisdiction when a cause of action arises. It would not be contended that its statutes of limitation prescribing a period of time within which suits may be brought do not apply to actions growing out of a transaction of interstate commerce as well as to others. It must follow from this that the States may make such statutes absolute; that is to say, not subject to be varied by a contract. The provision above referred to is within the scope of such powers, and it applies to actions growing out of interstate character. Railway Co. Dwyer, 75 Tex. 572, 12 S. W. Rep. 1001; Railway Co. v. Eddins (Tex. Civ. App.), 26 S. W. Rep. 161." In Armstrong v. Railway Co. (decided Feb. 27, 1895), reported in 29 S. W. Rep. 1117, the same question was presented and decided in the same way. See, also, Railway Co. v. Vandeventer, 38 Neb. 222, 41 N. W. Rep. 998. If a mere statute of a State can render null and void such contracts, surely

a constitutional provision can do the same. In the case of Railroad Co. v. Hedger, 9 Bush, 645, it was held that if live stock should be lost or injured while in the custody and care of the company or its agents, for transportation, this should be *prima facie* evidence of negligence, and the burden of proof is on the carrier to rebut this presumption. It was also held that a carrier cannot release himself by contract for ordinary negligence. Former decisions of this court, quoted by appellant to sustain its contention, have no application to this case, because they were rendered before the adoption of the present constitution.

The case of McDaniel v. Railway Co., 24 Iowa, 416, was an action against the railroad to recover for injury to cattle shipped from Clinton, Iowa, to Branch Station, Chicago, Ill. The contract of shipment contained a provision exempting the company from any liability over $100 on horses or valuable live stock, except by special agreement. The damage claimed was over $100. We quote as follows from the opinion in that case: "By chapter 113 of the Laws of the Eleventh General Assembly, it is enacted 'that in the transportation of persons or property by any railroad or other company, or by any person or firm engaged in the business of transportation of persons or property, no contract, receipt, rule or regulation shall exempt such railroad or other company, person or firm from the full liabilities of a common carrier, which, in the absence of any contract, receipt, rule or regulation would exist with respect to such persons or property.' Laws 1866, p. 121. No question is made but that under the operation of this statute the special contract in this case would be void, so that the rights and liabilities of the parties would be measured by the common law, as applicable to common carriers. But it is claimed by appellant's counsel that the contract, though made in Iowa, was to be, by its terms, wholly performed in Illinois, and that the law of the place where the contract is to be performed must govern, in determining its validity and effect. The general rule is that, in conformity to the presumed intention of the parties, the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance. Story, Confl. Laws, § 280. But it is also a general rule that, if the contract is void or illegal by the law of the place where it is made, it is held void and illegal everywhere. *Id.* § 243, and authorities cited. In this case, however, it is unnecessary to rest the decision upon any general rule; for by the express terms, as well as by the necessary implication, of the contract, it was to be partly performed in Iowa. The cattle were received in Clinton, Iowa, "to be delivered at Chicago, Ill. To do this, it was necessary to transport them some distance, more or less, in Iowa, before they could reach Illinois. The contract being entire and indivisible, made in Iowa, and to be partly performed here, it must, as to its validity, nature, obligation and interpretation, be governed by our law. And by our law, so far as it seeks to change the common law, it is wholly nugatory and inoperative. The rights of the parties, then, are to be determined under the common law, the same as if no such contract had been made." The foregoing opinion was quoted with approval by the Supreme Court of United States in Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 457, 9 Sup. Ct. Rep. 469, in the following language: "In McDaniel v. Railway Co., 24 Iowa, 412, 417, cattle transported by a railroad company from a place in Iowa to a place in Illinois, under a special contract made in Iowa, containing a stipulation that the company should be exempt from liability for any damage, unless resulting from collision or derailing of trains, were injured in Illinois by the negligence of the company's servants; and the Supreme Court of Iowa, Chief Justice Dillon presiding, held the case to be governed by the law of Iowa, which permitted no common carrier to exempt himself from the liability which would exist in the absence of the contract. The court said: 'The contract being entire and indivisible, made in Iowa, and to be partly performed here, it must, as to its validity, nature, obligation and interpretation, be governed by our law. And by our law, so far as it seeks to change the common law, it is wholly nugatory and inoperative. The rights of the parties, then, are to be determined under the common law, the same as if no such contract had been made.'"

The case of Hart v. Railroad Co., 69 Iowa, 485, 29 N. W. Rep. 597, was a suit to recover damages for injury to horses shipped from Des Moines, Iowa, to the town of Miller, in Dakota Territory. The contract provided, in substance, that the defendant should not be liable for more than $100 damages to each horse. Section 1308 of the Code of Iowa provides that no contract, receipt, rule or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier or carrier of passengers which would exist had no contract, receipt, rule or regulation been made or entered into. We quote the third and final paragraph of the decision in the above-named case: "The evidence tended to prove that two of the horses were worth $150 each, and that two others were worth $125 each, and that the others were worth $100 each. Defendant asked the circuit court to instruct the jury that, under the contract, defendant's liability for the horses could not exceed $100 per head. The court refused to give this instruction, and ruled that, if plaintiff was entitled to recover, the jury should award him the full value of the property. Whether a common carrier, in the absence of any statute restricting his powers in that respect, can, by rule, regulation or contract, limit his liability for the property received by him for carriage, has been the subject of much discussion, and there is great conflict in the decision of the courts on the question. We have no occasion, however, in this case, to enter into that question. No one would question that, in the absence of a contract limiting the amount of his liability, the shipper would be entitled, in case of the destruction or injury of the property under such circumstances as that the carrier was liable for the loss, to recover full compensation for injuries sustained. The statute quoted above prohibits the making of any contract that would exempt him from the liability of a common carrier which would exist if no contract, rule or regulation existed. If the statute is applicable to a contract in which the undertaking is to transport the property from this State into another State or territory of the United States, it cannot be doubted, we think, that the provision of the contract in question, by which it was sought to limit the liability of defendant for the horses to an amount less than the actual value of the property, is repugnant to its provisions, and consequently invalid. It is contended, however, that the State has no power to place a restriction of that character upon the carrier who contracts for the transportation of property from this State into another State or territory. The position is that the restriction, if applicable to a contract of this character, would be a regulation of commerce among

the States—a subject which, under the federal constitution, is within the exclusive jurisdiction of the congress of the United States. In our opinion, however, this position cannot be maintained. The provision is in no just or legal sense a regulation of commerce. It prescribes no regulation for the transportation of freight upon any of the channels of communication. It leaves the parties free to make such contracts as they may choose to make with reference to the compensation which shall be paid for the services to be rendered. The carrier is left free to demand such compensation for the carriage of the property as is just, considering the responsibility he assumes when he receives it. He is forbidden to make any contract that would exempt him from any of the liabilities which arise by implication from his undertaking to carry the property. But no burden is placed upon the property which is the subject of the contract, nor is any rule prescribed for his government respecting it. That it is within the power of the State to prescribe such a limitation upon his power to contract, we have no doubt. The statute was enatcted by the State in the exercise of the police power with which it is vested, and it is applicable to all contracts entered into within its jurisdiction. The question involved is not different in principle from that decided by the Supreme Court of the United States in what are known as the 'Granger Cases.' See Munn v. Illinois, 94 U. S. 113; Chicago, B. & Q. R. Co. v. Iowa, *Id.* 155; Peik v. Railway Co., *Id.* 164."

It seems clear to us that the contract relied upon by the appellant is in violation of section 196 of the constitution, and therefore void where the contract was made; and, being void in this State, it is void everywhere. Story, Confl. Laws, § 243; 7 Lawson, Rights, Rem. & Prac. § 3873.

STIPULATIONS IN POLICIES AGAINST ADDITIONAL INSURANCE.

Practically all fire policies contain clauses similar to the following: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." At a glance it will be seen that the policy of the companies is to absolutely forbid additional insurance unless consent therefor be indorsed upon the policy in writing by proper permit. Great care is taken to comprehend every conceivable kind of insurance, whether void or valid, whether on all or part of the property covered, etc. The object of such clauses is patent. The experience of underwriters reveals the fact that perhaps half of the losses covered by contracts of insurance are at least suspicious; that all the people are not honest, and that it will not do to tempt their honesty when considered from a necessary insurance standpoint. This standpoint is, of course, viewed from the whole aggregation of those who patronize insurance companies. In this school of experience it has been learned that one class of insurers patronize the companies for profit, the other for protection. That is, considering all insurers divided into two classes, one of which are honest, the other of doubtful integrity or wanting in this regard. If every one were unquestionably honest, the companies could and, doubtless, would, be perfectly willing to insure the full value of the property, and the idea of forbidding other insurance, not exceeding the value, would never have been conceived. But values must be kept within proper bounds and, usually, not more than three-fourths of the value of the property covered is carried by the companies. They require the assured to carry the other fourth as a pledge, we might say, of his sincere intentions and entire good faith. So, to afford themselves security from the known hazard of over insurance, the companies have adapted this clause either *verbatim* or in substance. The object thus outlined is a laudable one. It tends to protect the companies from fraudulent losses, promotes their prosperity and solvency and thereby benefits the honest policy-holder. And when the transaction is fair in every way, the courts are always ready to uphold and sustain this requirement of the policies, and readily hold them avoided when it is ignored. But this is only stating the general rule. There are exceptions to the rule as well defined, and as well sustained by authority as the rule itself. When the companies by any act of deceit or bad faith toward the assured, either by its principal officers or any of its many agents whom it sends abroad over the country in its stead to work up business, misleads the assured to his prejudice in making him believe that the clause will not be taken advantage of; when the company by its acts, declarations or conduct of itself or agents, puts itself in such an attitude toward the assured that it would be unconscionable to set up a forfeiture by reason of additional insurance, the courts then do not hesitate to deny them the right to assert the forfeiture. Indeed, if we look at the clause simply as a condition inserted in the contract, simply for the sake of a condition, and when the insured would

have the right to have permission for other insurance by custom of the companies, and when such stipulations are resorted to merely as a technical defense to avoid a liability, otherwise in good faith and honest, the courts will not, as a rule, strain themselves to find a pretense to sustain the forfeiture; if they did it is easy to conceive many cases where an applicant would be uninsured, at the option of the company, the very instant his policy should take effect. And a strict upholding of the forfeiture in every instance might have the effect of enabling the companies to perpetrate frauds as gigantic as those they attempt to avert. Often "to make assurance doubly sure and take a bond of fate" the policies further stipulate that none of the provisions may be waived by any agent of the company and sometimes these stipulations go so far as to include all officers and agents; in short, all those who have any authority to represent the company or in any way bind it by a contract of insurance. But such extraordinary stipulations are not upheld by the courts. With much good sense it is held that any parties who can make a contract, can alter or rescind it. The power to do one is tantamount to the power to do the other, and the companies cannot shear themselves of the power to contract by such a declaration in the contract itself. The following very sensible remarks of the Supreme Court of Michigan are frequently quoted with unqualified approval by the courts when passing upon such provisions of a policy: "There can be no more force in an agreement in writing not to agree by parol, than in a parol agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it."[1] There seems to have been a long struggle in the courts for the doctrine that the company may do, through its agent, that which may be done by its managing officers vested with the most comprehensive authority. That is, if the company have knowledge of a fact through its authorized agent, it has knowledge of same for all purposes, and it cannot possess this knowledge, either directly or through its agents, and then set up a forfeiture because some condition of a policy has not been complied with which they may have known all the while, and where it has received its premium with such express knowledge. So, when the assured takes other insurance at the instance of or with the knowledge and consent with agent with whom he deals, and who is authorized to make contracts of insurance for his company, the company may not defeat a recovery by reason of the lack of written indorsement, though the policy positively provides that it shall become void in the event of the additional insurance unless permission indorsed on the policy in writing is given. Obviously, the object of requiring the permission to be indorsed on the policy is to apprise the company of the additional insurance to the end that it may object thereto if it sees fit. If it have knowledge of the additional insurance and lead the assured to believe that it will not insist on the forfeiture, it would be a great injustice to hold the policy void under such circumstances. Because if the company make objection or cancel its policy by reason thereof, the assured may seek protection elsewhere, whereas, if he rely on the assurances of the company that it will not insist on a stipulation the law does not compel it to assert, it is nothing but proper that the company be denied the right to abuse the confidence thus reposed in its integrity. Any other rule at first blush is repulsive to the sense of justice. This is the trend of the modern cases, and it points out the destiny of the rule itself, and foreshadows its ultimate establishment.[2] The United States Circuit Court of Appeals for the eighth circuit has lent its sanction to the rule as stated in a very recent case[3] in the following forcible language, per Caldwell, J.: "The injunction of the law is upon every man not to perpetrate fraud. If, notwithstanding this injunction of the law, he seeks

[1] Insurance Co. v. Earle, 33 Mich. 143. See Ins. Co. v. McRae, 8 Lea (Tenn.), 513, 2 Am. Law Reg. & Rev. (N. S.) 551, 561; Fireman's Fund Ins. Co. v. Norwood, 69 Fed. Rep. 71.

[2] Carrugi v. Ins. Co., 40 Ga. 135; Pechner v. Ins. Co., 65 N. Y. 195; Miller v. Hartford Fire Ins. Co., 70 Iowa, 704; Bradnup v. St. Paul F. & M. Ins. Co., 27 Minn. 393; Kitchen v. Hartford Fire Ins. Co., 57 Mich. 135; Phœnix Ins. Co. v. Spiers, 87 Ky. 285; McEwen v. Ins. Co., 5 Hill, 101; American Central Ins. Co. v. McRae, 8 Lea (Tenn.), 513; Arff v. Star Fire Ins. Co., 125 N. Y. 57; Boetcher v. Ins. Co., 47 Iowa, 253; Haywood v. Ins. Co., 22 Mo. 181; Van Bories v. Ins. Co., 8 Bush (Ky.), 133; Eames v. Home Ins. Co., 94 U. S. 621; Cobb v. Ins. Co., 11 Kan. 93; Phœnix Ins. Co. v. Johnston, 143 Ill. 106; Havens v. Ins. Co., 111 Ind. 190; Reed v. Ins. Co., 17 R. I. 785.

[3] Firemen's Fund Ins. Co. v. Norwood, 69 Fed. Rep. 71.

to use any stipulation in a contract in a manner that will absolve him from an honest obligation, and enable him to perpetrate a fraud upon an innocent party whom he has misled by his fraudulent conduct, a court of justice will not lend its assistance to effectuate the fraud, but will hold him estopped to make such an unconscionable use of the contract. It is not in the power of an insurance company to abolish the law of estoppel or waiver, or exempt itself from its operation, by any provision or condition that it can insert in its policies. The chief object of estoppel or waiver is to prevent the consummation of fraud, and, when the facts bring the case within the well settled rules of this subject, no stipulation of the contract can be used to stay its operation. Public policy and sound morality forbid that any stipulation in a contract shall, either in terms or by construction, have the effect to preclude a party who has been deceived and defrauded by the other party to the contract from setting up such fraud by way of estoppel or waiver, or as a defense as may be indicated by the rules of law applicable to the case." And parol evidence may be introduced to establish the waiver.[4] The company must either refuse to issue a policy where the existing insurance is forbidden, or, if additional insurance be taken out subsequently to the issuance of its policy, it must cancel and offer to return the unearned premium to the assured, as soon as it learns, through its agents or otherwise, of the additional insurance; if it does not it will be estopped to insist on the forfeiture.[5] Nor is the assured to be prejudiced by the failure of the agent, learning of additional insurance in violation of the terms of the policy to disclose the fact to his principal. His knowledge is that of the company, and his neglect of duty to his principal must be chargeable to such principal. The assured has a right to presume that the agent will discharge such duty.[6] It was held by Lord Mansfield in the case of Tyre v. Fletcher,[7] that if, from any cause, the contract of insurance should not take effect, it was the duty of the insurer to return the premium paid. This doctrine is certainly proper, and has been followed in this country.[8] There seems to be no case where a policy has been in force part of its life and is then repudiated because of some forfeiture without a restoration of a proper proportion of the premium paid. But if a policy is issued and it does not take effect at all for any reason, there can be no liability. Neither can there be any if, at any time after it takes effect it is avoided by the taking of additional insurance or other act which would cause a forfeiture. Then, if the whole unearned premium must be returned, how can it be that any unearned part need not? The insurer is paid for a certain period. He must carry the risk all of that time or his premium is not all earned. Suppose there exists, without the knowledge of the company, insurance on the same property at the time its policy is executed, the policy then is absolutely void *ab initio*. It never takes effect, and according to the authorities noticed it becomes the duty of the company to restore the premium to the assured. If the policy ceases to take effect at any time before its expiration, it would seem to follow that the *pro rata* unearned premium should be refunded, just as must be the whole premium in the event of a cancellation by the company. In fact, the declaring the policy void by the company at any time after it has begun to run is practically a cancellation by the insurer, and the company will not be permitted to keep the premium for the full term and insist that the policy has been in force for only a part of the time. The two positions are inconsistent. The contract is for a certain period. This is paid for by the assured, and the company undertakes to indemnify in case of loss at any time within the period of existence of the policy. If before the end of the period it asserts its nonliability, it becomes its duty at least to pay back a proper portion of the premium. Where a policy is made payable to a third person as his interest or mortgage interest may appear, and after its execution and delivery the assured, in violation of the clause forbid-

[4] Carrugi v. Ins. Co., 40 Ga. 135; Firemen's Fund Ins. Co. v. Norwood, *supra*; Union Mut. Ins. Co. v. Wilkinson, 13 Wall. 222; Havens v. Ins. Co., 111 Ind. 90; Kenton Ins. Co. v. Shea, 6 Bush (Ky.), 174; American Fire Ins. Co. v. Luttrell, 89 Ill. 314.

[5] Horwitz v. Insurance Co., 40 Mo. 557; Van Bories v. Ins. Co., 8 Bush (Ky.), 133.

[6] Bebee v. Hartford M. F. Ins. Co., 25 Conn. 51; Hamilton v. Ins. Co., 15 Mo. App. 59; Security Ins. Co. v. Fay, 22 Mich. 467.

[7] Cowp. 668.

[8] James v. Ins. Co., 90 Tenn. 604; May, Ins., Sec. 4; Phœnix Ins. Co. v. Johnston, 143 Ill. 106.

ding other insurance, contracts for additional insurance, this violation of the terms of the policy will follow it in the hands of his mortgagee, and annul it. The theory is, that such a designation of a payee carries no further right in the policy than the assured himself had; and as he may annul the contract if it had not been thus assigned, in a sense he may still do so, his assignee claiming, necessarily, through the right of the assured to recover.[9] Where additional insurance was taken on property upon which there was in existence a prior policy, it was held that the second was avoided by the existence of the first, though the insured only retained the first a few days after contracting the second when he cancelled it.[10] Nor will the blank clause "total insurance permitted $—," unfilled out in a policy, be held to conflict with the clause forbidding other insurance. The fact that no sum is named in the blank does not import consent for other insurance, but the contrary.[11] And though the insurer contract other insurance which by its terms is made payable to a mortgagee, as his interest may appear, this is such an insurance of the mortgagor's interest as will defeat a policy already in existence forbidding additional insurance by the assured.[12] *Aliter*, however, where the insurance is contracted and paid for by the mortgagee on his interest in the property, as such, exclusively.[13] But a policy, of course, is not forfeited by reason of other insurance which has expired or been cancelled before the taking effect of the second policy.[14] The clause forbidding the additional insurance upon penalty of invalidating the policy will not have the effect of absolutely avoiding the insurance, but makes the policy voidable only upon a violation thereof, at the option of the insurer. The stipulation is inserted for his benefit. The law will not compel him to insist on it, and if he does not there is no forfeiture.[15] But there is nothing unreasonable in the stipulation itself, nor is it contrary to public policy.[16] And if an agent of assured, without his knowledge, obtain other insurance in violation of the terms of the policy, the law enjoins on the assured the duty, on learning of such fact, of making the same known to the company and disowning any benefit under the additional insurance.[17] And an answer to an action on a policy setting up additional insurance contrary to the terms of the policy, but which does not allege that such additional insurance was contracted with the knowledge or consent of the insured, is bad, as the law does not permit a stranger or third person to invalidate a policy by improperly or otherwise taking insurance on the same property without the knowledge of the assured, all of which must be negatived by the answer.[18] And when another policy is contracted in violation of the terms of the first, on the same property, both of which contain the provision that prior or subsequent insurance shall make them void, respectively, it cannot be set up in an action on either policy that the other was void by reason of the violation of the clause forbidding other insurance on the plea that there was no insurance at the time the second policy took effect, because the first was invalidated by the other insurance, or *vice versa*.[19] Some of the policies require that the assured give notice to the

[9] Insurance Co. v. Fix, 53 Ill. 151; Continental Ins. Co. v. Hulman & Cox, 92 Ill. 145. It is not to be overlooked that in an early case in New York a contrary doctrine was announced in the case of Traders' Ins. Co. v. Robert, 9 Wend. 404; and this case was approved by that of Tillou v. Ins. Co., 1 Seld. 406, and seems to have been followed by an early South Carolina case. Charleston Ins. Co. v. Neve, 2 McMul. 237. But the force of these cases is practically destroyed by the later utterances of the Court of Appeals of New York in the cases of Grosvenor v. Ins. Co., 17 N. Y. 391, and Buffalo Steam Engine Works v. Ins. Co., *Id.* 401, as well as the much later case of Weed v. Ins. Co., 116 N. Y. 120, repudiating the doctrine of the earlier cases. The early conclusion has likewise been assailed in other States and may be considered practically overturned. Ins. Co. v. Fix, *supra*; Continental Ins. Co. v. Hulman & Cox, *supra*; State Mut. Fire Ins. Co. v. Roberts, 31 Pa. 438; Hale v. Ins. Co., 6 Gray (Mass.), 169.

[10] Gardiner v. Ins. Co., 58 Mo. App. 611.

[11] La Belle v. Ga. Home Ins. Co. (Tex. Civ. App.), 28 S. W. Rep. 133.

[12] Guinn v. Phoenix Ins. Co. (Tex. Civ. App.), 31 S. W. Rep. 566.

[13] Traders' Ins. Co. v. Pacaud, 150 Ill. 245; Commercial Union Ins. Co. v. Scammon, 126 Ill. 355; Copeland v. Insurance Co., 96 Ala. 615.

[14] German Ins. Co. v. Hayden (Colo.), 40 Pac. Rep. 453.

[15] Hughes v. Ins. Co. of North America, 40 Neb. 626; Von Bories v. Ins. Co., 8 Bush (Ky.), 133; Carrugi v. Ins. Co., 40 Ga. 135; American Union Ins. Co. v. Luttrell, 89 Ill. 314; Stone v. Ins. Co., 60 Iowa, 737.

[16] Westchester Fire Ins. Co. v. Storm, 6 Tex. Civ. App. 390.

[17] McKelvy v. German-American Ins. Co., 161 Pa. St. 279.

[18] Copeland v. Phenix Ins. Co., 96 Ala. 615.

[19] Reed v. Ins. Co., 17 R. I. 785.

company in the event of contracting other insurance; and when this is required notice of taking the additional insurance brought to the knowledge of the agent is sufficient.[20] The sufficiency of such notice has been denied, however, where it is given to an agent who has authority to solicit insurance, deliver policies, collect premiums, etc., but who has no authority, express or implied, to make and perfect contracts of insurance or to sign policies.[21] But the authorities fairly sustain the contention that an agent who has authority to issue policies, indorse permits thereon and such other acts as are within the real or apparent scope of the authority of a local recording agent, may waive a provision of a policy requiring notice of other insurance to be given to the company, or may by his knowledge and acquiescence in such additional insurance estop the company from claiming a forfeiture by reason thereof.[22] If an issue arise as to whether the agent or the company had such notice as would preclude a claim of forfeiture by reason of the want of notice or absence of consent in writing on the policy permitting same, the solution of the question would be for a jury under proper instructions from the court.[23] The principle that the forfeiture may be averted by reason of the acts, knowledge and declarations of the agent of the company, is in harmony with practically all the modern authorities. It is reasoned, with good grace, that if the agent can bind his principal by his consent in writing, or by his knowledge, he may waive the requirement or estop the company from insisting on it. And especially will this be true if the agent be such as has authority to write policies, make indorsements and effect contracts of insurance. If such an agent give his permission for additional insurance, he, of course, has knowledge of it, and the company through him likewise has. And the company may certainly waive any provision of its policy by authorizing their duly constituted agent to act in its stead in such matters. The authority itself carries with it by implication, at least, the right in the agent to waive the requirement or to estop the company from insisting on it. It is not the naked indorsement in writing on the policy alone that authorizes the additional insurance, it is the consent. The writing simply evidences the consent. The indorsement itself must preforce stand upon the substructure of consent. If this is had every purpose is served. If it is wanting none is. The failure to write the consent by no means precludes the idea thereof. If it exists, that sufficeth. There is no need for the contract of insurance to be in writing. This is in line with all the authorities, at least in harmony with the pronounced trend of the decisions. And if the contract of insurance may be made by parol, surely a stipulation that is merely incidental to the contract may be made or dispensed with in like manner.

Nashville, Ark. W. C. RODGERS.

[20] Union Insurance Co. v. Murphy, 4 Atl. Rep. 352.

[21] American Fire Insurance Co. v. Hampton, 54 Ark. 75.

[22] Kahn v. Traders' Ins. Co. (Wyo.), 34 Pac. Rep. 1059; Carrugi v. Ins. Co., 40 Ga. 140; Collins v. Ins. Co., 79 N. C. 279; Hamilton v. Ins. Co., 88 N. C. 71; Palmer v. Insurance Co., 44 Wis. 201.

[23] Pitney v. Glenns Falls Ins. Co., 65 N. Y. 6.

LANDLORD AND TENANT — DANGEROUS PREMISES — LIABILITY OF LANDLORD FOR INJURIES.

GLEASON v. BOEHM.

Supreme Court of New Jersey, February 20, 1896.

1. The duty which this court, in Gillvon v. Reilly, 11 Atl. Rep. 481, 50 N. J. Law, 26, declared a landlord owes to his tenants of apartments, access to which is by a common passage, he also owes to those who visit such tenants on lawful occasions.

2. He is thereby required to take reasonable care to have the common halls and stairways reasonably fit for use for the passage of the tenants, but he is under no obligation to furnish means for their safe use. He is therefore under no duty (unless assumed by contract) to furnish light at night, although such light may be necessary for safe use.

3. A visitor of such a tenant passed down a stairway with which she was unfamiliar, in the dark, without waiting for a companion, who was familiar with it, or seeking from her friend a light to enable her to see the flight of steps, and using no precautions for safety but by feeling with her hands and feet: Held, that her conduct was not that of a reasonably prudent person, and that she contributed by her negligence to injuries which she received by falling down such flight.

MAGIE, J.: In an action brought in the Hudson circuit, plaintiff obtained a verdict against the defendant for damages for injuries received by her under the following circumstances: On November 27, 1891, plaintiff visited a Mrs. Mitchell, who, as tenant of defendant, occupied rooms or apartments on the second story of his house. Plaintiff had never entered the house before. In going to Mrs. Mitchell's room on this occasion, she passed along a hall, and up a stairway, which were used in common by Mrs.

Mitchell and others who were occupying rooms or apartments in the house as defendant's tenants. She remained in Mrs. Mitchell's room until after dark on the evening of November 28, 1891. She then left her friend's rooms, to make a visit elsewhere. She was accompanied by her sister and Mrs. Mitchell's daughter, but preceded them both in passing down the last flight of steps of the stairway which led to the hall. There was no light in the hall, and she, supposing she had arrived upon the floor of the hall, went forward, and fell from the platform of that flight, receiving in the fall, the injuries for which she brought suit. There was evidence from which the jury could find that defendant had not demised to his tenants the hall and stairway, but retained control of them for their benefit. There was evidence that defendant employed one of the tenants to light, every night, one light in the upper hall, which was burning that night, and one light in the lower hall, which was not burning at the time of the accident. Whether it had been previously lighted was in question, and the preponderance of evidence was that it had been.

Had plaintiff been a tenant of the house, defendant's duty would have been that declared by this court in Gillvon v. Reilly, 50 N. J. Law, 26, 11 Atl. Rep. 481, viz., to take reasonable care to have the halls and stairways fit for use by the tenant in going to and coming from her part of the house. The court, by its instructions in this case, imposed upon the landlord a like duty in favor of one who was not a tenant, but was a visitor of a tenant. No contest has been made over the propriety of this ruling of the court, and very properly. The reasons upon which the rule of duty rests in one case establish a like rule in the other. When houses are rented for dwellings which can only be reached by the use of a common passage, the necessity of such use for the beneficial enjoyment of the thing demised establishes a right to such use, and imposes an obligation upon the landlord to take reasonable care to have and maintain the passage safe for such use. But the use of such rooms for dwellings equally necessitates the use of the passage by tradesmen in delivering goods, by persons having other business with the occupant, or by those who visit him for social reasons. With respect, therefore, to all persons visiting such a tenant upon any lawful occasion, the duty of the landlord is similar to that which he owes to the tenant. Miller v. Hancock (1893), 2 Q. B. 177; Hilsenbeck v. Guhring, 131 N. Y. 674, 30 N. E. Rep. 580.

At the trial, the claim of plaintiff was that defendant was guilty of a breach of the duty he owed her in two respects: (1) Because the stairway was improperly constructed, and dangerous; and (2) because there was no light in the lower hall at the time of the accident. The court charged the jury that they were not to consider the first ground urged for plaintiff. This was clearly right, for there was no evidence upon which a verdict in her favor on that ground could have been supported. But upon the second point the court left the liability of the defendant to the jury, with the instructions that they were to determine whether the maintenance of a light in the hall was necessary to render plaintiff's descent reasonably safe, and, if they found such necessity, that it was defendant's duty to exercise reasonable care to maintain a light there. In my judgment, these instructions improperly enlarged defendant's duty. He was undoubtedly bound to take reasonable care to have the hall and stairway reasonably fit for the passage to and fro of his tenants and their visitors. But no duty was imposed upon him in respect to the safe use of the means of passage provided by him. If those means were such as the rule required to be provided, he had performed his duty. If the stairway was fit for use in ascending and descending, the responsibility of safely using was upon the person using it. If, to use it safely at night, a light was requisite, he must provide it, and not the landlord. In Massachusetts it has been held that, when a landlord has rented to various tenants parts of a house to which access is obtained by a common stair, it is not his duty to remove snow and ice naturally accumulating thereon, but the tenant's duty. Woods v. Cotton Co., 134 Mass. 357. But for an injury resulting from an accumulation of ice from the rupture of a water pipe, which he was bound to repair, the landlord was liable. Watkins v. Goodall, 138 Mass. 533. If in this case, upon the failure of natural light, artificial light was necessary to make the descent of the stairway safe, I think it was erroneous to place the duty of providing such light upon the defendant. Hilsenbeck v. Guhring, *supra*. The landlord, doubtless, may, and probably usually does, assume the duty of providing necessary light in such cases, by contract with his tenants. There was evidence that defendant had usually provided a light in the lower hall, and had employed a person to light it. Upon this evidence, the court might have been requested to direct the jury to determine whether an implied contract to maintain such light, at least until notice of its discontinuance had been given, might not be inferred, and a corresponding duty to maintain it. But no such request was made, and we cannot consider now whether, if made, it could have been properly granted.

It is further contended by defendant that the verdict against him should be set aside on the ground that the instructions of the court in respect to the contributory negligence of plaintiff were erroneous, and on the further ground that the evidence of such negligence on her part was so conclusive that a verdict finding her to have exercised the required care for her safety ought not to stand. In my judgment, this contention must prevail, and upon both grounds. The instructions permitted the jury, in considering plaintiff's conduct, to take into account the duty of defendant to maintain a light in the lower hall,

which, as before stated, was erroneous. They, moreover, omitted to direct attention to the obvious fact that if plaintiff had waited until Mrs. Mitchell's daughter, who was familiar with the stairway, had come up with her, she could have been guided safely down, and the equally obvious fact that, by returning to Mrs. Mitchell's rooms, she could have procured a light, which would have insured her safe descent. But, assuming that the instructions did not mislead the jury, I think that a verdict finding that a person descending this stairway, with which she was not familiar, in the dark, and, having at hand means to insure her safety, passing on with no precautions except the groping with her hands and feeling with her feet, of which she testified, was exercising the care which a prudent person would exercise, cannot be supported. Where a guest of a tenant in such a house went into a common hall to go to a water closet, and, there being no light in the hall, by mistake opened the wrong door, and, passing through, fell down a flight of steps, the court of appeals of New York held that his conduct was negligent, and barred any recovery for his injuries. Hilsenbeck v. Guhring, *supra*.

For these reasons, the circuit court should be advised to make the rule to show cause absolute.

NOTE.—The principal case holds that it is the duty of the landlord "to take reasonable care to have the halls and stairways fit for use by the tenant in going to and coming from her part of the house." In thus holding we think the court is not sustained by the weight of the authorities, unless there is an express undertaking upon the part of the landlord to do so. It is also said that, "when houses are rented for dwellings which can only be reached by the use of a common passage, the necessity of such use for the beneficial enjoyment of the thing demised establishes a right to such use, and imposes an obligation upon the landlord to take reasonable care to have and maintain the passage safe for such use." If this proposition be correct, there is no doubt but that as "to all persons visiting such a tenant upon any lawful occasion, the duty of the landlord is similar to that which he owes to the tenant." Miller v. Hancock, 2 Q. B. 177; Hilsenbeck v. Guhring, 131 N. Y. 674, 30 N. E. Rep. 580. The relation of landlord and tenant rests upon contract express or implied or grows out of privity of contract or privity of estate, and the rights and liabilities of each, in the absence of fraud, misrepresentation or concealment, must be determined by principles of law applicable to contracts. There is, therefore, no implied covenant on the part of the landlord to make repairs or that the premises will prove to be suitable for the tenant's use or business, but as to everything relating to the enjoyment of the premises his responsibility is limited by the terms of the contract. The landlord may let a house though it be in a dangerous condition, and he incurs no liability, with respect to it, as the rule *caveat emptor* applies to the tenant in such cases. Davidson v. Fisher, 11 Colo. 583; Jaffe v. Harteau, 56 N. Y. 398; Sheridan v. Krupp, 21 Atl. Rep. (Pa.) 670; Quinn v. Perham, 151 Mass. 162; Krueger v. Ferrant, 29 Minn. 385; Ward v. Fagan, 101 Mo. 669; Lucas v. Coulter, 104 Ind. 81. But there should be no concealment or misrepresentation on the part of the landlord as to hidden or latent defects in the materials of which the building is made or in the construction of the building, whereby it becomes dangerous or unfit for the purpose for which it was let, for if fraud be shown and injury results therefrom to the tenant, the landlord would be liable as in other cases of fraudulent conduct. Coke v. Gotkese, 80 Ky. 598; Wolf v. Arrott, 109 Pa. St. 473; Arbuckle v. Biedeman, 94 Ind. 168; Minor v. Sharen, 112 Mass. 477; Cesar v. Karutz, 60 N. Y. 229. It is incumbent upon the tenant to inspect the premises to be occupied by him, and if he is unwilling to accept them, or does not wish to submit to the inconvenience of non-repairs, he may place the proper stipulations in the contract for his protection. So that in the absence of a statute or express agreement the inference is that the tenant is willing, for the rent agreed to be paid, to take the premises as he finds them, subject to any inconvenience or danger which may attend his occupancy of them. Taylor, Land. & Ten. sec. 175*a*; Carstairs v. Taylor, L. R. 6 Exch. 217; Keates v. Earl of Cadagan, 10 C. B. 591, 601; Krueger v. Ferrant, 29 Minn. 385; Ward v. Fagan, 101 Mo. 669. Nor is the tenant bound to keep the premises in repair unless he has agreed to do so. He may submit to the inconvenience arising from want of suitable or necessary repairs, not occasioned by his own fault, without violating any obligation to the landlord. When the landlord owes no duty to his tenant to repair, negligence cannot be imputed to him in that regard, and it follows that any injury to the leased premises which also injures the tenant, caused by the negligent acts of third persons, cannot create a liability against the landlord, as where loss is occasioned by fire (Doupe v. Genin), 45 N. Y. 119, or the falling of a building, not properly protected, in consequence of an excavation made on an adjoining lot. Sherwood v. Seaman, 2 Bosw. 127; Brewster v. De Fremery, 33 Colo. 341; Purcell v. English, 86 Ind. 34; Cole v. McKey, 76 Wis. 500; McCarty v. Fagan, 42 Mo. App. 619; Ward v. Fagan, 101 Mo. 669. Nor is the landlord liable for the expense of shoring up a building leased by him, in order to prevent injuries thereto or to the tenant, by the removal of a building by the adjoining proprietors. Howard v. Doolittle, 3 Duer, 464. But the landlord may be liable to the tenant for negligence, as where he occupied a part of the building, and the tenant occupied another part, and the landlord negligently permitted injurious substances to leak through into the tenant's apartments; and in all cases where the injuries complained of result from carelessness or mismanagement of himself or his servants with respect to the premises, the landlord may be liable. 12 Am. & Eng. Ency. of Law, p. 687. But where the tenant is lessee of only a part of the premises and the injury complained of was caused by the defective condition or non-repair of other parts of the structure of which he had no control, but were in the exclusive possession of the landlord, the authorities are not agreed upon the question of the liability of the landlord in such cases. For instance a tenant was permitted to recover in Massachusetts for injuries sustained by the defect of a stairway used by him in common with the landlord and other tenants. Looney v. McLean, 129 Mass. 35. And in Maine a recovery was had by a tenant for damages caused to his goods in the lower story of a house by a leaky roof. Toole v. Beckett, 67 Me. 544. But the authority of these cases has been expressly denied by other courts, and the weight of the authorities seems to be against the right of the tenant to recover in such cases. See cases heretofore cited. The same principle of non-liability upon the part of the landlord seems to apply whether the tenant be lessee of

the whole premises or of only a portion thereof. Doupe v. Genin, 45 N. Y. 119; Ward v. Fagan, 101 Mo. 669.

Thus while treating of the rule that the landlord is not bound, without a contract, to keep in repair the rented premises, the court said, in Purcell v. English 86 Ind. 34: "The duty of the tenant to keep in safe condition, for his own use, the demised premises, extends to all the appurtenances connected therewith and this includes steps, stairways, and other approaches." In Krueger v. Ferrant, 29 Minn. 385, the same principle was applied to a leaking roof, where the complaining tenant occupied a room on the ground floor and other tenants occupied the second floor between him and the roof. The court said: "The rule appears to be well established that there is no implied covenant on the part of the landlord to make repairs, or that the premises are, or will prove to be, suitable for the tenant's use or business. There seems to be no sound reason why this rule should not extend in like manner to portions of the premises not expressly demised to the tenant, but which are necessary for his use or protection as, in this case the common roof." A number of authorities might be cited in support of these propositions. But where the defect which caused the injury was not a part of the rented premises nor used by the tenant in connection therewith, was not within the possession or control of the tenant, but was within the exclusive possession of the landlord, a different rule should obtain. In such case, the tenant would stand in the position of a stranger, and the owner's liability for injuries by the defective condition of the premises, rests on the principle that each person is bound to so use his property as not to endanger, by the negligent use thereof, the person or property of another. Whether the negligence consists in the commission of an act or the omission of an ordinary precaution, is immaterial. And it is thought that one who is restricted by the terms of the letting to one part of the premises who has no possession, control, or right of interference with other parts, should as to such other parts which are in the exclusive control of the landlord, occupy no worse position than a stranger, and this would seem to be true, as to such defects or dangers as could not reasonably have entered into the contemplation of the parties when they made their contract. Wood on Land. & Tenant, Secs. 383-384. Looney v. McLean, 129 Mass. 33; Stockwell v. Hunter, 11 Met. 448; Pevey v. Skinner, 116 Mass. 129; Toole v. Beckett, 67 Me. 544.

As to third persons, the rule is that the landlord is answerable for injuries resulting from his own negligence, and not for those which result from the fault of the tenant. Thus where the plaintiff was injured by falling into a coal hole in the sidewalk in front of the leased premises, which had been negligently left open or out of repair by the tenant, the tenant alone was held responsible. Gordon v. Peltzer, 56 Mo. App. 599; Gilliland v. Railroad, 19 Mo. App. 411; Woods v. Cotton Co., 134 Mass. 357. But if the landlord should erect or create a nuisance and let the same to a tenant who thereafter maintains it, then both would be liable for injuries resulting therefrom to strangers or third persons; the one for the creation and the other for its maintenance. They would be considered as joint tort-feasors. Woods on Nuisances, sec. 269; Clifford v. Atlantic Cotton Mills, 146 Mass. 47, 49; Tate v. Railroad, 64 Mo. 165.

H. S. KELLEY.

St. Joseph, Mo.

CORRESPONDENCE.

CONFESSIONS IN PERJURY.

To the Editor of the Central Law Journal:

If the doctrine laid down by the Supreme Court of Wyoming in the case of Reavis v. State, 44 Pac. Rep. 62, is correct, men, in certain cases, may commit perjury with perfect impunity; and then the fact is that a man could safely commit a crime which is *malum in se* without any power in the law to punish him. It looks as if an error were made in classing Reavis with Chandler as a coconspirator or as a codefendant. It is conceded that as to persons jointly indicted, that the confession of one may not be used in the separate trial of the other. 2 Russell Cr. 864. But in the Reavis case the plaintiff in error committed his crime several weeks after the assault by Chandler. Their offenses were not only not concurrent but entirely different in character. Suppose a murder occurred, and the prosecution relied mainly upon circumstantial evidence, and this was weak. Uncorroborated this evidence would be insufficient. But the defendant confides the fact to a friend that he committed the crime. Upon the trial the witness endeavors to establish an *alibi* for the prisoner, but the jury are forced by the strength of the confession and the corroborating circumstances to convict the defendant. What, under the Reavis rule, could be done with the perjured witness? In the indictment for perjury it would be necessary to allege and it would also be necessary to prove the main crime. On the original trial of the murderer he must have gone free but for the testimony as to his confession. Yet on the trial of the perjurer this testimony is not admissible and he is perforce acquitted. Who can deny that the rule in the Reavis case puts a premium on perjury? The cases in 33 Tex. App. 317, 26 S. W. Rep. 400, and 57 Miss. 424, are not the only cases in point. Rex v. Turner, 1 Mood. C. C. 347, is the original case, but it is explained away by Russell. B.

A QUESTION OF DEVISE.

To the Editor of the Central Law Journal:

In your issue of June 5th, the following question is propounded: "W T died leaving a will containing the following item: 'Item 6, I give and bequeath to my grandchildren, A T and W T, the north 1-2 of the the northeast 1-4 of section 9, township 59, range 29, 80 acres, and to their bodily heirs forever; said land is not to be sold or incumbered during the minority of said grandchildren, said land lying and being in the county of Daviess and State of Missouri.'" The writer asks what estate is devised to the grandchildren in the 80 acres of land. Second, the devisor dying in July, 1895, and the 80 acres having been leased by him, who would be entitled to the rent of the tract for that year, grandchildren or the executor? The effect of the devise at common law was to create a fee-tail in the 80 acres in the grandchildren. By virtue of section 8836, R. S. of Mo., this estate is changed into a life estate in the grandchildren as tenants in common, with remainder in fee-simple absolute to the children of said grandchildren. Clarkson v. Clarkson, 125 Mo. 385; Chiles v. Bartleson, 21 Mo. page 344. By the terms of the devise, the land cannot be sold or incumbered during the minority of said grandchildren. This devise would probably be construed as giving them a power of sale upon arriving of age, and the supreme court of this State, has uniformly held, that where a power of sale is annexed to a life estate, the exercise of this power will pass a fee-simple title in the property. Second: In the absence of anything showing that the land is needed to pay the debts of the testator, the rents goes to the grandchildren.

H. D. W.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and o the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCIDENT INSURANCE — Asphyxiation.—An accidental asphyxiation by illuminating gas which escaped into the room where insured slept was not within a clause in an accident policy providing that the insurance did not cover injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, absorbed, or inhaled.—FIDELITY & CASUALTY CO. OF NEW YORK v. WATERMAN, Ill., 44 N. E. Rep. 283.

2. ACCORD AND SATISFACTION—Evidence.—A creditor who accepts money tendered by the debtor unconditionally, does not, by that act, estop himself from maintaining an action to recover any further sum that may be due.—BECKMAN v. BIRCHARD, Neb., 67 N. W. Rep. 784.

3. ACCOUNT STATED—Evidence.—The rendering of an account between parties, and agreeing upon the amount due as appearing therefrom, will support an action for the balance thereby shown, without an express promise to pay.—HENDRIX v. KIRKPATRICK, Neb., 67 N. W. Rep. 759.

4. ADMINISTRATION—Executors—Appeal from Order.—The executor who is a legatee has the right to appeal from a judgment against him in his official capacity. He has the right also to appeal from a judgment ordering a distribution of the funds in a manner different from that exhibited by his account. Representing all parties, he has the right to appeal for the common benefit of all, as it is his duty to see that the funds are distributed among those whom the testator intended should be beneficiaries.—SUCCESSION OF ALLEN, La., 20 South. Rep. 193.

5. APPEAL — Supersedeas.—In this State an appeal does not operate as a *supersedeas*, except as provided by statute, and upon the terms imposed by statute.—HOME FIRE INS. CO. v. DUTCHER, Neb., 67 N. W. Rep. 766.

6. ATTACHMENT — Debts—Situs.—Debts have no *situs*, but may be attached in any State other than that in which the debtor is a resident.—HOWLAND v. CHICAGO, R. I. & P. RY. CO., Mo., 36 S. W. Rep. 29.

7. ATTORNEY AND CLIENT — Champerty.—A contract by which an attorney agrees to render services for a fee contingent upon success, the fee to be a stipulated per cent. of the amount recovered, is not champertous, where he does not undertake to pay any part of the expenses of litigation.—DOCKERY v. MCLELLAN, Wis., 67 N. W. Rep. 733.

8. BENEFIT ASSOCIATIONS—Assignment of Policy.—A benefit association, "organized for the purpose of assisting widows, orphans, or other dependents of deceased members by providing for the payment by each member of a fixed sum to be held until the death of a member, then to be paid to the person or persons entitled thereto," etc., issued a policy which provided that it might be assigned "to any party having an insurable interest in the life of said member, with the assent thereto of the beneficiary herein," and with the assent of the proper officers of the association: Held, that a simple creditor of the member did not have an insurable interest in his life, within the meaning of the provision.—NATIONAL EXCH. BANK OF LEXINGTON v. BRIGHT, Ky., 36 S. W. Rep. 10.

9. CARRIERS—Interstate Shipment.—Act March 4, 1891, invalidating contracts which limit to less than two years the period in which suit may be brought on them, applies to an interstate shipment of live stock.—GALVESTON, H. & S. A. RY. CO. v. HERRING, Tex., 36 S. W. Rep. 129.

10. CHATTEL MORTGAGE — Effect of Failure to File.—Under Rev. St. 1895, art. 3328, providing that a chattel mortgage not filed for record forthwith shall be void as to creditors of the mortgagor and subsequent purchasers and lienholders in good faith, such a mortgage, though not filed at once after its execution, is not void as to those who became creditors after its filing.—MAVERICK v. BOHEMIAN CLUB, Tex., 36 S. W. Rep. 147.

11. CHATTEL MORTGAGE—Extension of Record.—Under a statute requiring a chattel mortgage to be extended by affidavit filed within 30 days before the maturity of the debt secured, a mortgage securing a note given as collateral to another indebtedness does not require such extension to be made on maturity and renewal of the principal debt, before the maturity of the collateral note.—CLAUSE PRINTING PRESS CO. v. CHICAGO TRUST & SAVINGS BANK, Ind., 44 N. E. Rep. 256.

12. CHATTEL MORTGAGES—After-acquired Property.—A chattel mortgage upon cattle, described as owned by the mortgagor at the time the mortgage was given, and as being on a certain farm, does not cover cattle acquired by the mortgagor two months afterwards, as against a subsequent *bona fide* mortgagee.—IOWA STATE NAT. BANK OF SIOUX CITY v. TAYLOR, Iowa, 67 N. W. Rep. 677.

13. CONTRACT—Defense of Illegality.—Where the illegality of a contract is relied upon as a defense, but does not appear by the plaintiff's complaint, it must be pleaded by the defendant's answer, showing such a state of facts that no recovery can be had thereon.—WOODBRIDGE v. SELLWOOD, Minn., 67 N. W. Rep. 868.

14. CONTRACT FOR HIRE—Evidence.—Plaintiff, a filer, wrote defendant, a mill owner, relative to the "coming sawing season," asking him "how long a run" he expected to have, whether he was "going to run nights," and what he would pay plaintiff "to come and keep the saws up." Defendant, in reply, stated that he would pay plaintiff for day, and for night and day, runs; that he did not know whether he would run nights or not, but that he expected to have "a good season's work." Plaintiff accepted, and commenced work: Held, a contract to hire plaintiff so long as defendant ran his mill during the season.—LEWIS v. NEWTON, Wis., 67 N. W. Rep. 724.

15. CONTRACT—Public Policy—Lobbying.—Plaintiff, a person of large experience in regard to federal public lands, because satisfied that a certain class of lands, that had been kept out of the market on account of a supposed claim under certain railroad grants, could be legally thrown open to settlement, entered into an agreement with defendant, who was desirous of acquiring such lands, to instruct the latter in regard to

the manner of procuring the same, and to do all that was necessary to have such lands thrown open to settlement, in consideration of a certain proportion of the value of the land acquired by defendant: Held, that the contract was not *per se* invalid, as against public policy, as a lobbying contract.—HOULTON v. NICHOL, Wis., 67 N. W. Rep. 715.

16. CONTRACTS — Combination in Restraint of Trade. —A contract by which a manufacturer of windmills granted exclusive territory for their sale to a firm, the windmills, after shipment, to remain the property of the maker until sold by the consignees, then to be paid for at a fixed price, was one of agency, and did not create a trust or conspiracy against trade, as defined and prohibited by Act March 30, 1889, p. 141, though it fixed the prices at which the windmills were to be sold, and bound the consignees to handle no other kind; the statute having no application to contracts between principal and agent.—WELCH v. PHELPS & BIGELOW WINDMILL CO., Tex., 36 S. W. Rep. 71.

17. CONTRACTS — Statute of Frauds—Party Wall.— Where one of two adjoining proprietors was about to build upon his land, and, at the request of the other, constructed a party wall, situated half on the land of each, and the other, after the completion of the wall, promised to pay one-half the cost thereof, the case is not within the statute of frauds, and a recovery can be had upon the promise to pay.—STUHT v. SWEESY, Neb., 67 N. W. Rep. 748.

18. CORPORATION—Assignment by Corporation—Preferences.—A general assignment by an insolvent corporation for the benefit of creditors, in which debts due the stockholders and directors, and debts upon which the stockholders and directors are indorsers, are preferred, is fraudulent and void.—LOVE MANUF'G CO. v. QUEEN CITY MANUF'G CO., Miss., 20 South. Rep. 146.

19. CORPORATIONS—Acts of Directors—Notice.—A director of a corporation, dealing in its property on his own account, is chargeable with notice of the action of the board of directors as to such property, whether he was present or not at the meeting which took such action.—GREENVILLE GAS CO. v. REIS, Ohio, 44 N. E. Rep. 271.

20. COURTS—Conflicting Jurisdiction.—The presentation to a judge of a federal court of a bill asking the appointment of a receiver for a railroad company, which is examined by the judge, and ordered filed, gives that court exclusive jurisdiction from that time over the property and assets of the corporation, when followed by the appointment of receivers in the case; and a debtor of the railroad company, garnished in an action in a State court after the filing of such bill, should be discharged on application of the receiver therefor.—RIESNER v. GULF, C. & S. F. RY. CO., Tex., 36 S. W. Rep. 53.

21. CRIMINAL PRACTICE—Forgery.—Section 6702, Gen. St. 1894, provides that a person "who knowing the same to be forged or altered, and with intent to defraud, utters, offers, or disposes of, or puts off, as true, or has in his possession, with intent so to utter, offer, dispose of, or put off, either a forged will, deed, certificate, indorsement, record, instrument, or writing, or other thing, the false making, forging, or altering of which is punishable as forgery, is guilty of forgery in the same degree as if he had forged the same:" Held, that an indictment charging the defendant with having fraudulently and feloniously uttered and disposed of a forged instrument, then knowing the same to be forged, but omitting the words "as true," is insufficient.—STATE v. CODY, Minn., 67 N. W. Rep. 798.

22. CRIMINAL PRACTICE—Forgery.—Under Sayles' Civ. St. art. 3776 (Rev. St. 1895, art. 3962) which provides that the amount contracted by trustees to be paid a teacher shall be paid on a check drawn by the majority of the trustees on the county treasurer, in all instances be accompanied by the affidavit of the teacher that he is entitled to the amount specified in the check, an indictment for forging such a check is fatally defective where it fails to allege that the affidavit of the teacher accompanied the check.—CAFFEY v. STATE, Tex., 36 S. W. Rep. 82.

23. CRIMINAL LAW—Homicide—Insanity.—Rev. St. § 4700, providing for an inquisition where there is a probability that the accused is, at the time of his trial, insane, and thereby incapacitated to act for himself, to determine whether he is so insane, which is in affirmance of a power of the court at common law, is in aid of, and not in derogation of Const. art. 1, § 7, securing to accused a fair and impartial trial, the result of the inquisition having no legal effect on the main issue.—FRENCH v. STATE, Wis., 67 N. W. Rep. 716.

24. CRIMINAL PRACTICE—Homicide—Former Acquittal.—A general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing.—BALL v. UNITED STATES, U. S. S. C., 16 S. C. Rep. 1192.

25. CRIMINAL LAW—Homicide—Instructions.—Where an indictment comprehends every degree of criminal homicide, and a conviction for murder is sought, it is the duty of the court to charge upon the constituent elements of manslaughter as well as murder, unless there is an entire absence of evidence having a tendency to reduce the crime to manslaughter.—COMPTON v. STATE, Ala., 20 South. Rep. 119.

26. CRIMINAL LAW—Larceny by Finding and Conversion.—Code, § 3907, provides that if any person come by finding into the possession of personal property of which he knows the owner, and unlawfully appropriates the same, he is guilty of larceny: Held, that where the property is so marked as to be capable of identification, proof of the possession and of the immediate subsequent conversion is admissible to establish the *corpus delicti*.—STATE v. HAYES, Iowa, 67 N. W. Rep. 673.

27. CRIMINAL LAW—Murder—Premeditation.—It is not necessary that any length of time intervene between the formation of the intent to kill and the act of killing, to render the killing murder in the first degree.—LAWRENCE v. STATE, Tex., 36 S. W. Rep. 90.

28. DECEIT—Acceptance of Order.—The act of A, in writing on an order "Accepted, C, by A," is a representation that he has authority to accept the order for C, notwithstanding the addition of the words, "agent for the negotiation of within-mentioned loan," they being mere words of description, and not such as to disclose the full scope of A's authority.—CONANT v. ALVORD, Mass., 44 N. E. Rep. 250.

29. DECEIT — False Representations — Wrongful Arrest.—False promises made to induce the promisee to come into the State, and with the intent to there cause his arrest, are fraudulent representations, and actionable.—SWEET v. KIMBALL, Mass., 44 N. E. Rep. 243.

30. DEED—Delivery as Security.—A deed of real estate, absolute in its terms, executed and intended as a security for a debt or loan, will be construed as a mortgage merely, as between the parties, and all others, except good-faith purchasers for value without notice.—NAMES v. NAMES, Neb., 67 N. W. Rep. 751.

31. DEED — Reformation — Mistake.—In the sale of land, a mutual mistake of the parties in supposing land, fenced and pointed out as the land to be conveyed, to consist of one lot and a portion of another only, whereas, in fact, there was also included therein a portion of a third lot, owned by the grantor, authorizes the grantee to have the deed, which conveyed only the first lot and a portion of the second, reformed, so as to include the portion of the third lot included within the fence.—EZELL v. PEYTON, Mo., 36 S. W. Rep. 35.

32. DEED — Warranty — Eviction. — Where a covenantee in a deed containing the usual covenant of warranty surrenders and abandons possession of the land conveyed because a paramount title has been asserted against him in the courts by the holder thereof,

and such title has been adjudged valid, his right of action for a breach of the covenant is complete. A surrender and abandonment of possession under such circumstances is a constructive eviction.—WAGNER v. FINNEGAN, Minn., 67 N. W. Rep. 795.

33. DEEDS—Acknowledgment.—A notary public affixed a formal acknowledgment to an unsigned deed in his possession, and took it to the purported grantors, wife and husband, for their signatures. The property described was the wife's statutory estate, and the deed was invalid unless signed by the husband, as required by Code, § 2348. The wife signed the deed, but the husband would not. Without correcting the acknowledgment, the notary delivered the deed to the grantee, who some days afterwards prevailed on the husband to sign it, but no acknowledgment was made: Held, that the acknowledgment was void for lack of jurisdiction, and therefore could be shown to be so by parol evidence.—CHENEY v. NATHAN, Ala., 20 South. Rep. 99.

34. DIVORCE—Condonation.—Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct, and the repetition of the offense revives the wrong condoned.—HEIST v. HEIST, Neb., 67 N. W. Rep. 790.

35. ESTOPPEL BY DEED—After-acquired Tax Title.—A grantor in a warranty deed may acquire a tax title to the land conveyed under a sale for taxes accruing after he conveys.—FOSTER v. JOHNSON, Tex., 36 S. W. Rep. 67.

36. EVIDENCE—Husband and Wife—Criminal Conversation.—Rev. St. § 4072, provides that "a husband or wife shall not be allowed to disclose confidential communications made by one to the other, during their marriage, without the consent of the other. In an action for criminal conversation, the plaintiff's wife is a competent witness for the defendant as to any matter in controversy, except as aforesaid:" Held, that letters written by plaintiff's wife to him prior to an alleged alienation of her affections are admissible in evidence on the question of damages alleged to have been sustained by plaintiff.—HORNER v. YANCE, Wis., 67 N. W. Rep. 720.

37. EVIDENCE — Identification of Letter. — A letter which is shown to have been received by a witness by mail, inclosed with a paper which had been sent by the witness by mail, addressed to the person whose name appeared to be signed to the letter, the envelope inclosing it bearing the postmark of the town of such person's residence, is sufficiently identified to be admissible in evidence without proof of the handwriting.—WHITE v. TOLLIVER, Ala., 20 S. W. Rep. 97.

38. FRAUDS, STATUTE OF—Contract.—In an action for damages for breach of a contract, after a judgment by default, and inquiry was rendered, plaintiff was allowed to amend his complaint as a count for damages, and defendant was given permission to file an answer so as to deny the amount of damages: Held, that defendant could not defend on the ground that the contract was within the statute of frauds.—WILLIAMS v. CROSBY LUMBER CO., N. C., 24 S. E. Rep. 800.

39. GARNISHMENT—Fraudulent Conveyance.—Where a garnishee has possession of property which he has obtained from the debtor by virtue of a sale which is a fraud upon creditors, the process of garnishment runs against such property, and plaintiff does not thereby affirm the sale, but may attack it as fraudulent and, if successful, enforce the lien created on the property by the garnishment.—ARMSTRONG CO. v. ELBERT, Tex., 36 S. W. Rep. 139.

40. GIFT CAUSA MORTIS—Rights of Donor's Personal Representative.—The donee of a gift *causa mortis* is not dependent on the will of the personal representative of the deceased donor for his title. The title vests in the donee during the life-time of the donor, subject to recall by revocation of the gift. The subject of the gift forms no part of the estate of the donor. His personal representative cannot, therefore, lay any claim to it, except in case of necessity, for the payment of debts which could not otherwise be paid. When such representative seeks to pursue such gift in the hands of the donee, he must show the facts constituting the necessity, i. e., deficiency of assets with respect to debts, and his recovery will be limited to the extent of such necessity.—SEYBOLD v. GRAND FORKS NAT. BANK, N. Dak., 67 N. W. Rep. 682.

41. GIFT—Delivery.—The rule that delivery of a deed of gift may be to a stranger for the use of the grantee implies that the instrument truly expresses the intention of the grantor. But where the instrument so delivered does not express the real intent of the grantor, and has not been recorded, nor actually delivered to the grantee, the grantor may lawfully resume possession of the instrument, and correct it, so that it will conform to the real intent.—NEEKS v. STILLWELL, Ohio, 44 N. E. Rep. 267.

42. GIFTS—Inter Vivos—Deposit in Bank.—Plaintiff's father deposited money in a savings bank, telling the treasurer it was for his son after his death, and the bank book was indorsed to that effect. Plaintiff testified that a few months after the deposit, his father had given him the book, telling him to keep it; plaintiff looked it over, to see what it was, but handed it back, telling his father to keep the book and use what money he wanted; that several times thereafter his father told him he could have the money when he wanted it: Held, that the evidence was sufficient to warrant the finding that the father intended a present gift to the son, and not a testamentary gift.—SCRIVENS v. NORTH EASTON SAV. BANK, Mass., 44 N. E. Rep. 81.

43. HOMESTEAD—Mortgage — Estoppel.—Plaintiffs in the application for a loan, alleged upon oath that the land offered as security was not their homestead or the homestead of any other person. It appeared, however, that defendant's agent knew that plaintiffs had a homestead right in the property: Held, that plaintiffs were not estopped from maintaining an action to set aside the deed of trust given to secure the loan made in accordance with the application on the ground that the property was their homestead.—WATKINS v. MANHAM, Tex., 36 S. W. Rep. 145.

44. INJUNCTION—Disbursement of Taxes.—A petition by a taxpayer to enjoin the disbursement of a tax, on the ground that the proceedings by which it was levied and collected were invalid, must show the amount of the tax paid by petitioner, as, to entitle him to an injunction, he must show substantial damage.—ROBBS v. LATHAM, Mo., 36 S. W. Rep. 33.

45. INSOLVENCY—Preference.—A finding that an assignment by a debtor of credits to secure a debt, in order to secure additional credit, to enable her to continue her business, was not in fraud of the insolvency laws, is warranted by evidence that, though the debtor was unable to pay her debts in the ordinary course of business as they fell due, both she and the creditor believed that her assets were more than sufficient to pay them, and that the want of ready money was due solely to an unwillingness to imperil her custom by pressing her customers for prompt payment of their bills.—MUNDO v. SHEPARD, Mass., 44 N. E. Rep. 244.

46. INSURANCE—Agency—Evidence.—In an action on a fire policy, in which recovery depends on plaintiff's establishing either that the person that issued the policy was an agent of defendant by appointment or by holding out, the issue as to appointment is properly withdrawn where the evidence shows that such person issued the policy depending on its probable ratification by defendant, or on his probable early appointment, and that the risk was never reported to defendant by him.—RAHR v. MANCHESTER FIRE ASSUR. CO., Wis., 67 N. W. Rep. 725.

47. INSURANCE — Execution of Policy.—The countersigning of an insurance policy by an agent, when required by the terms of the policy, is a part of its execution by the company; and, when it purports to be countersigned by such agent, no further proof as to his signature or authority is required in an action on

the policy, unless its execution is denied by plea verified by affidavit, as required by 2 Starr & C. Ann. St. p. 1798, ch. 110, § 33.—FIREMEN'S INS. CO. v. BARNSCH, Ill., 44 N. E. Rep. 285.

48. INSURANCE—Mortgage Clause—Construction.—To a fire insurance policy was attached a "mortgage clause," making the loss payable to a named mortgagee of the insured property, and providing that the insurance should not be invalidated by any act or neglect of the mortgagor or owner of the insured property: Held, (1) that the mortgage clause was an independent contract between the insurance company and the mortgagee; (2) that no act or omission of the mortgagor, whether the same occurred at the time of the issuance of the policy, or prior or subsequent thereto, invalidated said insurance policy.—HANOVER FIRE INS. CO. v. BOHN, Neb., 67 N. W. Rep. 774.

49. INSURANCE — Mortgaged Personal Property.—Defendant's agents, who were also engaged in banking, issued a fire policy covering certain property on which they, as bankers, held a chattel mortgage: Held, that this was sufficient notice to the company to support the presumption that the condition in the policy that it should be void if the subject of the insurance was personal property incumbered by mortgage was waived.—MCDONALD v. FIRE ASSOCIATION OF PHILADELPHIA, Wis., 67 N. W. Rep. 719.

50. JUDGMENT — Collateral Attack.—That the affirmance of a judgment against a school district was bad by reason of collusion of the parties does not justify a collateral attack of the judgment, the remedy being by timely proceeding to set aside the order of affirmance.—EDMUNDSON v. INDEPENDENT SCHOOL DIST. OF JACKSON, Iowa, 67 N. W. Rep. 671.

51. JUDGMENT — Res Judicata.—A privy in estate, so as to be bound by a judgment affecting real estate to which he was not a party, is one whose title must be derived from a party bound by the judgment. A claimant of land under the homestead donation laws is not concluded by judgments against prior claimants, holding the land to be owned by a private person under a former grant; the State, through whom such settler claims, not being bound by the judgment.—COLEMAN v. DAVIS, Tex., 36 S. W. Rep. 103.

52. LANDLORD AND TENANT — Forcible Entry and Detainer.—Under Code 1892, § 4461, providing that forcible entry and detainer may be maintained by the legal representatives or assigns of any person against whom the possession of land is withheld by a tenant after the expiration of his right, the purchaser at an execution sale may maintain such action against the tenant of the defendant in execution.—GLENN v. CALDWELL, Miss., 20 South. Rep. 152.

53. LANDLORD AND TENANT — Surrender — Offer.—Where, a year before the expiration of a lease for a term of years, the lessees wrote the lessor that, by reason of business reverses, they were unable to furnish hands and teams to work the leased premises, and advised him that, as it was early in the season, he could rent it out to some one else, and lose nothing by reason of their failure, and the lessor did not reply, but soon afterwards took charge of the place, and induced a subtenant to take up a rent note he had executed to the lessees, and execute a new note direct to him for the rent, and gave no notice to the lessees that he was managing the place on their account, or that he expected them to make good any deficiency in the rent, it constituted an offer on the part of the lessees to surrender the premises, and an acceptance thereof by the lessor.—WILLIAMSON v. CROSSETT, Ark., 36 S. W. Rep. 27.

54. MARRIED WOMAN—Mortgage—Estoppel of Wife.—Rev. St. 1894, § 6964 (Rev. St. 1881, § 5119), declares contracts of suretyship of married women void, and section 6972, Rev. St. 1894 (section 5127, Rev. St. 1881), provides that married women, in exercising their powers to contract, shall be bound by estoppel *in pais* like other persons: Held, that where a married woman complies with all the statutory requirements to obtain a loan from the school fund, and joins with her husband in a mortgage of land held by them as tenant by entireties to secure it, and the auditor, without any objection from her, paid the money to her husband, she was estopped from claiming that the mortgage was given to secure money to pay her husband's debts, and therefore void as a contract of suretyship.—TRIMBLE v. STATE, Ind., 44 N. E. Rep. 260.

55. MASTER AND SERVANT — Appliances—Negligence.—Where an action against a railroad company by an employee for injuries is based on negligence of an engineer and defective appliances, and the undisputed evidence shows that the engineer is a fellow-servant of plaintiff, the submission to the jury of the issue of negligence, based on the acts of the engineer, will necessitate a reversal.—GULF, C. & S. F. RY. CO. v. WARNER, Tex., 36 S. W. Rep. 118.

56. MASTER AND SERVANT — Contract of Employment.—In an action by an employee to recover pay for time lost during the term of service, the burden is on plaintiff to prove that such time was to be paid for by the terms of the contract of employment; otherwise, the employer is entitled to recoup himself for a material loss of the services of the employee.—WILSON v. SMITH, Ala., 20 South. Rep. 134.

57. MASTER AND SERVANT—Negligence—Defective Appliances.—A master does not insure his servants against defective appliances. The rule is that he is bound to use such care as the circumstances reasonably demand to see that the appliances furnished are reasonably safe for use, and that they are afterwards maintained in such reasonably safe condition.—LINCOLN ST. RY. CO. v. COX, Neb., 67 N. W. Rep. 740.

58. MECHANICS' LIENS—Affidavit — Description.—Section 2, ch. 54, Comp. St. 1895, construed, and held, the description of the real estate on which materials furnished by a subcontractor have been used in erecting an improvement is a necessary part of the affidavit required to be filed by such subcontractor in order to entitle him to a lien.—DREXEL v. RICHARDS, Neb., 67 N. W. Rep. 742.

59. MORTGAGE — Recording — Sufficiency.—The fact that the register, in recording a mortgage, transcribed the surname of one other than the grantors in the granting clause and in the description of the land, will not invalidate the registry, where the mortgage was otherwise correctly transcribed, and shows that the register made a clerical mistake in so transcribing the names, and it appears that the admission to probate and the order of registration were all duly made, and the mortgage was indexed in the name of the grantors.—ROYSTER v. LANE, N. Car., 24 S. E. Rep. 796.

60. MORTGAGES — Foreclosure Sale.—The provisions of the statute requiring the sheriff to deduct from the real value of lands levied upon the amount of the liens and incumbrances prior to that of the mortgage which the property is ordered sold to satisfy, being for the sole benefit of the plaintiff, the defendant, owner of the equity, cannot be heard to object to the confirmation of the sale because such liens and incumbrances were not deducted in making the appraisement."—AMERICAN INV. CO. v. MCGREGOR, Neb., 67 N. W. Rep. 785.

61. MORTGAGES—Merger.—A mortgagee assigned an undivided half interest in the mortgage and the notes secured thereby. The assignees purchased the mortgaged lands, and assumed the payment of the secured indebtedness: Held, that the assignees' interest in the debt secured was merged in the legal title, and that the lands in whole remained liable as security for the debt due the mortgagee.—EHRMAN v. ALABAMA MINERAL LAND CO., Ala., 20 South. Rep. 112.

62. MUNICIPAL CORPORATION—Streets—Prescription.—Evidence that a street was platted over plaintiff's land 25 years before suit, that it was used for public travel; that subsequent sales of adjacent lands were made with reference to such street as a boundary; and that 10 years before suit the city authorized the use o

the street by a street railroad, shows a prescriptive right to use the land as a street.—WARING v. CITY OF LITTLE ROCK, Ark., 36 S. W. Rep. 24.

63. MUNICIPAL CORPORATIONS — Action to Recover Taxes Paid.—An action to recover alleged illegal taxes paid to a city sounds in tort, and, where the city charter provides that no action for a tort shall lie against it unless a statement of the claim shall have been presented to the council within 90 days after the happening of the tort, a complaint for the recovery of taxes which does not allege the presentation of such statement is demurrable.—FLIETH v. CITY OF WAUSAU, Wis., 67 N. W. Rep. 731.

64. MUNICIPAL CORPORATIONS — Powers. — Where a railroad company, by permission of a city, constructs its road on land outside the city limits, intended eventually to be an extension of a street, the city cannot, after the land is brought within the city limits, by ordinance, interfere with rights which had vested in the company before the extension of the city limits, not derived from the city government; and such rights are unaffected by an ordinance requiring the company to remove its track.—JOHNSON v. OWENSBORO & N. RY. CO., Ky., 36 S. W. Rep. 8.

65. MUNICIPAL CORPORATIONS—Suit against a City.—Code, § 757, providing that no person shall sue any city unless the claim is first presented to be audited and allowed, and the authorities neglect to act upon it or misallow it, applies only to claims arising on contract, and not to claims for unliquidated damages for personal injuries.—SHIELDS v. TOWN OF DURHAM, N. Car., 24 S. E. Rep. 794.

66. NEGLIGENCE—Dangerous Premises.—While it is the duty of the master to keep his premises in a safe condition, so as not to endanger the life or limbs of the servant, yet the servant will be denied relief against the master for injuries arising out of the unsafe condition of his premises, if with ordinary prudence the servant could have avoided the injuries.—MCCARTHY v. WHITNEY IRON WORKS CO., La., 20 South. Rep. 171.

67. NEGLIGENCE — Proximate and Remote Cause.—While plaintiff, with another employee, was standing on the station platform, helping to unload a large box from a freight car, the conductor, who was within the car, pushing on the box, stepped into a hole, which had been burned through the floor of the car, thereby losing his hold on the box, and plaintiff, being unable to bear the weight so suddenly cast upon him, fell, and was injured by the falling box: Held, that the hole in the car floor was not the proximate cause of the injury.—LOUISVILLE, ETC. RY. CO. v. SOUTHWICK, Ind., 44 N. E. Rep. 263.

68. NEGOTIABLE INSTRUMENTS—Demand.—Where the maker of a note, prior to its maturity, abandons his place of business, if he has a residence in the place which is known, or may be with reasonable diligence ascertained, a presentment and demand at the old place of business is insufficient.—REINKE v. WRIGHT, Wis., 67 N. W. Rep. 737.

69. NEGOTIABLE INSTRUMENTS—Illegal Consideration.—Plaintiff, with full knowledge of the facts, sold furniture for use in a house of prostitution, under a contract providing for monthly payments, and that the purchaser should use the furniture in her house; title to remain in the vendor until the price was paid: Held, that the contract, and notes given in accordance therewith, were void, being based upon an illegal consideration.—REED v. BREWER, Tex., 36 S. W. Rep. 99.

70. NEGOTIABLE INSTRUMENT—Note—Pleading.—In a suit upon a promissory note the answer of the defendant was a general denial: Held, that the defense that the consideration for the note was an illegal sale of intoxicating liquors made by the payee to the maker, was an affirmative defense, and could not be proved under a general denial.—DILLON v. DARST, Neb., 67 N. W. Rep. 783.

71. NEGOTIABLE INSTRUMENTS — Variation by Evidence. — Evidence contradictory of the terms of a promissory note cannot furnish a defense to such note when it is admitted by defendants that such note was duly executed by them.—MILLER v. GUNDERSON, Neb., 67 N. W. Rep. 769.

72. PARTNERSHIP—Evidence.—Where it is sought to hold the defendant liable as a member of a partnership firm, the mere statements of one who claimed to be acting for and as a member of such firm are not competent to establish the disputed partnership relation.—WEIR v. ILLINOIS NAT. BANK OF SPRINGFIELD, Neb., 67 N. W. Rep. 992.

73. PARTNERSHIP—Negotiable Instruments—Ratification.—General authority to a partner, after dissolution, to close up the partnership indebtedness by executing notes in the firm name, does not authorize him to bind his late copartner by stipulating in such notes to pay attorney's fees and to waive exemptions.—BROWN v. BAMBERGER, Ala., 20 South. Rep. 114.

74. PRINCIPAL AND AGENT — Authority of Agent.—Where on the issue as to the ostensible authority of an agent to receive payment of a mortgage for his principal, arising from the negligence of the principal in holding the agent out as having such authority, the facts, though not disputed, are such that reasonable minds might draw different conclusions therefrom, the issue is properly left to the jury.—REID v. KELLOGG, S. Dak., 67 N. W. Rep. 687.

75. PRINCIPAL AND AGENT—Notice to Agent.—In an action against a school committee, brought by the assignee of a contract to recover the balance due thereon, defendant alleged that the balance had been paid to a creditor of the assignor in garnishment proceedings. It appeared that long prior to the garnishment the assignor had notified the chairman of the defendant committee that the contract had been assigned to plaintiff: Held that, the chairman being an agent of defendant, notice to him was sufficient to fix defendant's liability to the assignee.—ANNISTON NAT. BANK v. SCHOOL COMMITTEE OF TOWN OF DURHAM, N. Car., 24 S. E. Rep. 792.

76. PROCESS—Service.—While a ministerial officer is not obliged to serve process in his hands, when he has knowledge from other sources that the court or officer issuing it was without jurisdiction of the person against whom it is directed, he will, nevertheless, be justified in executing it according to its command, if regular in form, and the want of jurisdiction does not appear upon its face.—HENLINE v. REESE, Ohio, 44 N. E. Rep. 269.

77. PUBLIC LANDS—Grant for Railroad Purposes.—A grant of land by congress to a State in aid of railroad construction is a grant *in præsenti;* and the title of the beneficiary, when the lands are earned and selected, relates back to the date of the grant. The federal government cannot subsequently give title to lands covered by such grant, as against the State or its grantees.—PAIGE v. KOLMAN, Wis., 67 N. W. Rep. 698.

78. PUBLIC LANDS—Riparian Rights.—The title of the grantee from the federal government of land bordering on a non-navigable lake, meandered in the original survey, does not extend to the center of the lake.—FULLER v. SHEDD, Ill., 44 N. E. Rep. 286.

79. QUIETING TITLE—Action.—One in possession of lands under a bond for title, and claiming to be the owner, cannot maintain an action to quiet title, since it is required, by St. § 11, that plaintiff in such case must have both the legal title and the possession.—BRANDENBURGH v. LOUISVILLE TIN & STOVE CO., Ky., 36 S. W. Rep. 7.

80. QUIETING TITLE—Adverse Possession.—In an action *quia timet*, in this State, the question of title between the parties may be fully litigated and determined, and a decree rendered assigning the title to the real estate, or any part of it, to the party entitled thereto.—DOLEN v. BLACK, Neb., 67 N. W. Rep. 763.

81. RAILROADS—Accidents at Crossings—Negligence. Where employees of a railroad company suddenly ran

an engine against cars standing near a crossing which they knew was used by children going to and from school, so as to drive them upon the crossing and cause them to run over a child who was with due care attempting to cross, the company was liable.—GULF, C. & S. F. RY. CO. v. WEST. Tex., 36 S. W. Rep. 101.

82. RAILROAD COMPANY—Consolidation.—A complaint against a railroad company, alleging that defendant acquired by purchase and assignment all the property and franchises of another road, is insufficient to charge defendant with liability for a tort committed by such other road prior to the purchase and assignment, since it fails to show a consolidation of defendant with such other road, under Rev. St. §§ 1833 or 1788, or otherwise, in which case alone defendant would be liable.—PENNISON v. CHICAGO, M. & ST. P. RY. CO., Wis., 67 N. W. Rep. 702.

83. RAILROAD COMPANY — Fires—Notice. — In Laws 1893, ch. 202, requiring a notice in writing to be given to a railway company of a claim for damages occasioned by fire set by a locomotive, within one year after the event causing such damage, the provision that "such notice may be given in the manner required for the service of summons in a court of record" is permissive only, and a delivery of the notice to a general officer of the corporation, or any agent having a general authority to act for it in respect to the subject-matter to which the notice relates, is sufficient.—ATKINSON v. CHICAGO & N. W. RY. CO., Wis., 67 N. W. Rep. 703.

84. RAILROAD COMPANY—Fires—Notice.—Under Laws 1893, ch. 202, providing that no action can be maintained against a railway company for damages to property by fire from a locomotive unless notice of the claim be given, an amendment should not have been allowed demanding damages for injuries to a tract of land not included in the original notice.—DONOVAN v. CHICAGO & N. W. RY. CO., Wis., 67 N. W. Rep. 721.

85. RAILROAD COMPANY—Negligence.—Though a person is lying helpless on a railroad track, his negligence is not deemed concurrent where, by the exercise of ordinary care, the company's servants could have seen him in time to prevent an injury by the proper use of the appliances at their command.—LLOYD v. ALBEMARLE & R. R. CO., N. Car., 24 S. E. Rep. 805.

86. RAILROAD COMPANY — Street Railways—Contributory Negligence.—Plaintiff, a regular repairer of city crossings, knowing that defendant's cars passed along the street at frequent intervals, placed a plank on the top of crossing sleepers to level them, one end so near the track as to come in contact with passing cars; and, standing with his back toward approaching cars, he leaned over the end near the track to see whether the sleepers were level. His hearing was good. He only became aware of the car's approach when close on him, and then jumped to the other side of the plank, and the car knocked the plank against his ankle and injured it: Held, that plaintiff was guilty of contributory negligence.—EDDY v. CEDAR RAPIDS & M. C. RY. CO., Iowa, 67 N. W. Rep. 676.

87. RAILROAD COMPANIES—Contributory Negligence.—One who for years was accustomed to walk on the tracks of the defendant railway company through its switchyard, with the knowledge of the company, and knew the position of the frogs and switches, and who was killed, at night, by a train, on account of his foot catching in an unblocked frog, was not, as a matter of law, guilty of contributory negligence.—LEE v. INTERNATIONAL & G. N. R. CO., Tex., 36 S. W. Rep. 63.

88. RAILWAY COMPANIES — Negligence—Fires.—An instruction authorizing the jury to find defendant liable if it negligently allowed combustible material to collect upon its right of way, and negligently set fire thereto, and negligently allowed it to escape, is not error prejudicial to defendant because of the failure of evidence as to setting the fire, since the effect of the instruction is to impose an additional burden on the plaintiff.—BALTIMORE & O. R. CO. v. COUNTRYMAN, Ind., 44 N. E. Rep. 265.

89. REFERENCE — Award of Costs.—Referees acting under an order of reference made during the pendency of an action can award costs, though the order of reference is silent as to such power.—MCLAUGHLIN v. OLD COLONY R. CO., Mass., 44 N. E. Rep. 252.

90. REFERENCE — Power of Referee.—A referee appointed under Rev. St. § 2864, subd. 2, "to take an account between the parties, and report the same to the court," has no power to pass on and determine the basic issues in the case, and his powers cannot be enlarged by implication or consent of the parties.—BEST v. PIKE, Wis., 67 N. W. Rep. 697.

91. RELEASE—Mistake.—A sheriff who, though complaining that he was under the statute entitled to a certain amount per day for keeping prisoners, in deference to the opinion of the attorney general and county judge to the contrary, and the refusal of the county to pay such sum, presents his bill to the county for a less sum, and is paid the same, cannot afterwards recover of the county the difference.—XIMENES v. WILSON COUNTY, Tex., 36 S. W. Rep. 127.

92. REMOVAL OF CAUSES.—A cause cannot be removed from a State to a federal court simply because during the litigation a construction of the federal constitution becomes necessary.—GALVESTON, H. & S. A. RY. CO. v. STATE, Tex., 36 S. W. Rep. 111.

93. RES JUDICATA.—Where, in trespass to try title, the pleadings put in issue the question of rents and profits, the fact that no evidence in support of the claim for rents was offered, until after the trial, when it was rejected on the ground that it came too late, does not show that the court refused to pass upon such claim, or that it was abandoned, so as to prevent the judgment, which merely awarded possession to plaintiff, and was silent as to the claim for rents, from being *res judicata* as to the claim for rents.—RACKLEY v. FOWLKES, Tex., 36 S. W. Rep. 77.

94. SALE—Conditional Sale — Waiver.—Where goods are sold, to be paid for on delivery, an absolute and unconditional delivery of the goods by the vendor to the vendee without exacting payment passes title and waives the condition. Therefore, where corn was sold to be paid for on delivery, and it was placed, with the vendor's knowledge and consent, into bins of the vendee, and there mingled with a mass of corn belonging to the vendee, the vendor lost his right to reclaim the corn for non-payment.—KINGSLEY v. MCGREW, Neb., 67 N. W. Rep. 787.

95. SALE — Prospective Products of Mill.—A contract of sale of the future products of a mill for a certain period, at a specified price, in consideration of advancements by the vendee to pay for the raw material and certain operating expenses, is valid.—WILLIAMS v. CHAPMAN, N. Car., 24 S. E. Rep. 810.

96. SALE—Warranty—Notice of Defects.—A warranty on the sale of a threshing machine provided that "if, in one week from the time of starting, it shall not perform" as warranted, "the purchaser agrees to notify" the vendor and his agent, named: Held, that the warranty must be construed as providing that if, after a week's trial, the machine did not do the work it was warranted to do, notice should be given within a reasonable time, and not necessarily within the week.—GAAR, SCOTT & CO. v. STARK, Tenn., 35 S. W. Rep. 149.

97. TAXATION—Abatement.—Where the assessor's notice requires property owners to bring in lists of their real and personal estates, one who, in good faith, omits to mention a piece of real estate of which the assessors had a description on their books, is not deprived of his right to ask for an abatement of the personal property tax.—WRIGHT v. CITY OF LOWELL, Mass., 44 N. E. Rep. 249.

98. TAXATION—Assessment — Sale.—When property has been seized and sold in a suit to which the owner was not a party, and the purchaser sells the same to another, and it is assessed in the name of the latter, and sold at tax sale, the assessment and sale are null and void.—MARTIN v. SOUTHERN ATHLETIC CLUB, La., 20 South. Rep. 181.

99. TAXATION—License—Brokers.—A person engaged in selling on commission in a city merchandise by sample for his several principals, having an office where his samples are exhibited, is a local commercial broker, though he makes special arrangements in advance with those by whom he is employed, and is their sole representative in his city.—STRATFORD v. CITY COUNCIL OF MONTGOMERY, Ala., 20 South. Rep. 127.

100. TAXATION—Tax Title—Mistake of Officer.—If an owner of land in good faith applies to the proper officer for the purpose of paying the taxes thereon, and is prevented by the mistake or fault of such officer, the attempt to pay is considered the legal equivalent of actual payment, and title to the land will not pass by its subsequent sale for such tax; but this rule has no application where the officer applied to is not the one authorized to receive the tax.—EDWARDS v. UPHAM, Wis., 67 N. W. Rep. 728.

101. TOWNS—Distribution of Water.—A town which has acquired the franchise, property, rights, and privileges of a water company, under St. 1892, ch. 310, which provides (section 5) that the company may distribute water through the town, and make contracts with any fire district therein, or with any individual or corporation, to supply water for any purpose, may deliver water to a mill corporation therein, though its mill property, which is on a continuous parcel wholly in its occupation, lies partly within the town and partly within an adjoining city, and the water is distributed by the corporation, throughout its premises, on both sides of the boundary line between the town and city.—CITY OF LAWRENCE v. TOWN OF METHUEN, Mass., 44 N. E. Rep. 247.

102. TRIAL — Evidence in Rebuttal — Discretion. — Where, in an action for personal injuries, the case as made by plaintiff shows contributory negligence, it is not an abuse of discretion to refuse to allow plaintiff to testify for the first time to rebut the showing of contributory negligence, which was made more manifest by the evidence of defendant.—WINTERTON v. ILLINOIS CENT. R. CO., Miss., 20 South. Rep. 157.

103. TRUST—Resulting Trusts.—A resulting trust in land does not arise in favor of a person lending to the purchaser thereof money with which to pay a portion of the purchase price.—HITT v. APPLEWHITE, Miss., 20 South. Rep. 161.

104. TRUST — Revocable Trusts—Validity.—That insured, who held a policy on his life payable to his administrators, executors, or assigns, assigned it to a third person, as collateral security for a small loan, with directions, in case of insured's death without having repaid the money, to collect the policy, and divide the proceeds, after deducting the amount of the loan, between certain persons, is sufficient, on the death of insured without revoking the trust, to create in favor of such persons a valid trust, as against the administrator of insured. — HISERODT v. HAMLETT, Miss., 20 South. Rep. 143.

105. TRUSTS—Trustee — Estoppel.—In an agreement for the organization of a corporation and for the purchase of lands, it was provided that title to the lands should be taken in the name of defendant's ancestor, to be held in trust for the corporation, and to be conveyed to it when organized. The corporation was organized, defendant's ancestor becoming a stockholder and an officer: Held, that the relations of defendant's ancestor to the corporation estopped him from denying the legality of the organization in order to avoid the trust.—TUCKASEEGEE MIN. CO. v. GOODHUE, N. Car., 24 S. E. Rep. 797.

106. VENDOR AND PURCHASER—Action for Price.—The rights and liabilities of parties to a parol agreement for the conveyance of real property are not necessarily reciprocal. One who enters into possession of land under a parol promise by the owner to convey, the latter subsequently fully performing by the tender of a good and sufficient deed, may be liable in an action for the purchase price, although such possession be not of itself such part performance as would entitle him to an action for specific performance of the contract.—STEPHENS v. HARDING, Neb., 67 N. W. Rep. 76.

107. VENDOR AND PURCHASER—Demand for Deed—Certain inquiries, from time to time, as to when a deed would be delivered, and requests that the same be delivered, held not to amount, under the circumstances, to a demand for the same, so as to entitle the vendee, who had acquiesced in delay, to rescind for failure to execute and deliver such deed.—MCNAMARA v. PRIGILLY, Minn., 67 N. W. Rep. 661.

108. VENDOR AND PURCHASER—Lien.—Where a grantor holds his grantee's notes for the purchase price of lands, secured by a vendor's lien, and a subsequent grantee assumes the payment of the notes, the taking of possession by the original grantor, after an election to rescind the contract and make the premises a homestead, is a release of the grantee's obligations on the notes.—MAYS v. SANDERS, Tex., 36 S. W. Rep. 108.

109. VENDOR AND PURCHASER — Rescission.—On the rescission of a contract for the sale of land for default of the vendor, the vendee is entitled to a lien on the vendor's interest in the land for repayment of the amount paid on the contract, though not in possession.—BULLITT v. EASTERN KENTUCKY LAND CO., Ky., 36 S. W. Rep. 16.

110. VENDOR AND PURCHASER—Sale of Land—Rescission.—Misrepresentations as to the location, quality, and value of real estate, by a vendor, are sufficient grounds for rescission, when relied upon by the vendee, and he is unacquainted with its value and condition, and has been prevented by the fraud of the vendor from making an examination of the property.—STOCHL v. CALEY, Neb., 67 N. W. Rep. 783.

111. WILLS — Election by Widow.—Where, after renouncing the will, the widow is assigned dower in property, part of which was specially devised to others, such devisees, after her death, are entitled to contribution out of the residuary estate.—TREASY v. TREASY, Ky., 36 S. W. Rep. 3.

112. WILLS—Legacies.—Testator devised the income of his entire estate to his wife for life; the estate upon her death to be distributed among certain legatees, and the balance, if any, to go to certain of the legatees to whom specific legacies had been given. The wife elected to take under the law: Held, that payment of the legacies should not be postponed until the death of the widow, so as to thereby increase the share of the residuary estate to the extent of the income of the legacies during the widow's life.—TRUSTEES OF CHURCH HOME FOR FEMALES AND INFIRMARY FOR SICK v. MORRIS, Ky., 36 S. W. Rep. 2.

113. WITNESS—Examination.—Where, in an action on a bill or note, the defendant is examined with respect to the genuineness of the signature alone, he should not on cross-examination be required to state his opinion touching collateral or incidental matters based upon a comparison of the disputed signature with others.—NORFOLK NAT. BANK v. JOB, Neb., 67 N. W. Rep. 781.

114. WITNESS—Transaction with Decedent.—The fact that the grantor in a deed is dead does not render inadmissible testimony of his delivery of the deed in an action by the grantee for the recovery of the land against one claiming under a subsequent deed from the decedent, where in the later deed the decedent warranted specially only; and his estate cannot be held liable thereon for a failure of the title.—HORNE v. NUGENT, Miss., 20 South. Rep. 159.

115. WRONGFUL ATTACHMENT—Damages.—Where, in an action for wrongful attachment, it appears that plaintiff had conveyed his entire mercantile business to a trustee for the benefit of certain creditors, damages for injuries to his mercantile credit are not recoverable.—R. F. SCOTT GROCER CO. v. KELLY, Tex., 36 S. W. Rep. 160.